Office - Supreme Court
FILED
MAY 21 1982
ALEXANDER L. STEVAS,
CLERK

81-2188

No. 81-_____

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA, et al.,

Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL T. GREELY
Attorney General for
The State of Montana

HELENA S. MACLAY
DEIRDRE BOGGS
Special Assistant Attorneys General
P. O. Box 8957
Missoula, Montana 59807
(406) 721-5440

Counsel for State of Montana
(and counsel to be served)

(additional counsel on inside cover)

COCKLE PRINTING CO., 2111 Douglas St., Omaha 68102

CALE CROWLEY
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH
P. O. Box 2529
Billings, Montana 59103

MAURICE R. COLBERG, JR.
HIBBS, SWEENEY, COLBERG,
JENSEN & KOESSLER
P. O. Box 2175
Billings, Montana 59103

JAMES E. SEYKORA
BERT W. KRONMILLER
P. O. Drawer S
Hardin, Montana 59304

DOUGLAS Y. FREEMAN
631 N. Center
Hardin, Montana 59034

Counsel for Private Petitioners

QUESTIONS PRESENTED

1. Do the disclaimer provisions in Montana's Enabling Act and Constitution deprive the Montana state courts of jurisdiction to adjudicate Indian and other federal reserved water rights?

2. Do the Montana state courts have jurisdiction to adjudicate Indian and other federal reserved water rights under the McCarran Amendment, when there has been no compliance with the procedures established in 25 U. S. C. § 1322?

3. Did the Montana District Court correctly hold that considerations of "wise judicial administration" require adjudication of all water rights in Montana's comprehensive adjudication proceedings rather than in piecemeal federal actions?

TABLE OF CONTENTS

	Pages
Questions Presented	i
Opinions Below	2
Jurisdiction	2
Constitutional Provisions, Treaties and Statutes Involved	3
Statement of the Case	7
Reasons for Granting the Writ:	
I. The Ninth Circuit's opinion on the effect of Montana's disclaimer provisions conflicts with decisions of this Court, and the decision of the Tenth *Circuit in Jicarilla Apache Tribe v. United States.*	9
II. The Ninth Circuit's decision conflicts with this Court's interpretation of the McCarran Amendment and Public Law 280 in *Colorado River Water Conservation District v. United States* and with the Tenth Circuit's decision in *Jicarilla Apache Tribe v. United States.*	15
III. The Ninth Circuit opinion conflicts with this Court's holding in *Colorado River Water Conservation District v. United States* that the McCarran Amendment grants state courts jurisdiction to adjudicate Indian water rights in general stream adjudications.	19
IV. The Ninth Circuit opinion raises serious and recurring problems concerning efforts by the states to adjudicate water rights.	21
Conclusion	23

TABLE OF AUTHORITIES

CASES:

Pages

Bryan v. Itasca County, 426 U. S. 373 (1976) 18

Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976) 8, 10, 15, 16, 17, 19, 20, 21

Draper v. United States, 164 U. S. 240 (1896) 11

Fort Mojave Tribe v. County of San Bernardino, 543 F. 2d 1253 (9th Cir. 1976) 18

Jicarilla Apache Tribe v. United States, 601 F. 2d 1116 (10th Cir. 1979), *cert. denied*, 444 U. S. 995 (1979) 9, 12, 13, 15, 16, 19

Kirkwood v. Arenas, 243 F. 2d 863 (1957) 18

Navajo Nation v. United States, 668 F. 2d 1100 (9th Cir. February 24, 1982) 21

Northern Cheyenne Indian Tribe of the Northern Cheyenne Indian Reservation v. Tongue River Water Users Association, et al., No. CV-75-6-BLG, CA-79-4887 7

Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation v. Adsit, 668 F. 2d 1080 (February 22, 1982) 1, 2, 12, 13

Organized Village of Kake v. Egan, 369 U. S. 60 (1962) 12, 13

San Carlos Apache Tribe of Arizona v. The State of Arizona, 668 F. 2d 1093 (9th Cir. February 23, 1982) 21

TABLE OF AUTHORITIES—Continued

Pages

State ex rel. Reynolds v. Lewis, 88 N. M. 636, 545 P. 2d 1014 (1976) 13

State of South Dakota, ex rel. Meierhenry v. Rippling Water Ranch, Inc., 531 F. Supp. 449 (D. S. D. 1982) 10, 21

The State of Washington, Department of Ecology v. Acquavella, Superior Court for the State of Washington for Yakima County, No. 77-2-01484-5 (February 16, 1982) 14, 21

United States v. Aageson, et al., No. CV-79-21-GF, CA-80-3032, 80-3044 8

United States v. Aasheim, et al., No. CV-79-40-BLG, CA-80-3028, 80-3061 8

United States v. Abell, et al., No. CV-79-33-M, CA-80-3038 8

United States v. AMS Ranch, Inc., et al., No. CV-79-22-GF, CA-80-3045 8

United States v. Big Horn Low Line Canal, et al., No. CV-75-34-BLG, CA-80-3062, 80-3063 8

United States v. District Court in and for Water Division No. 5, 401 U. S. 527 (1971) 10

United States v. District Court of Eagle County, 401 U. S. 520 (1971) 10

United States v. New Mexico, 438 U. S. 696 (1978) 20

TABLE OF AUTHORITIES—Continued

Pages

United States v. Tongue River Water Users Association, et al., No. CV-75-20-BLG, CA-80-3040, 80-3041-3042 8

Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U. S. 463 (1979) 17

White Mountain Apache Tribe v. Arizona, 649 F. 2d 1274 (9th Cir. 1981) 13, 18

White Mountain Apache Tribe v. Bracker, 448 U. S. 136 (1980) 14

STATUTES:

28 U. S. C. § 1254 (1) 2

Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. Section 1324, Public Law 280 6

Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. Section 1322, Public Law 280 ..... 5, 9, 15, 17, 18, 19

McCarran Amendment, Act of July 10, 1952, 66 Stat. 560, 43 U. S. C. Section 666 ..... 4, 8, 12, 15, 16, 17, 18, 19, 20, 21, 22

CONSTITUTIONS:

Idaho Const. art. 21, sec. 19, ratified by Congress, 26 Stat. 215 (1890) 11

Montana Constitution, Ordinance No. I (1889) 3, 9, 11

Montana Constitution, Article I (1972) 4, 11

Montana Constitution, Article IX, Section 3 (1972) 4

TABLE OF AUTHORITIES—Continued

Pages

Wyo. Const. art. 21, sec. 26, ratified by Congress, 26 Stat. 222 (1890) 11

MISCELLANEOUS:

Alaska Enabling Act, 72 Stat. 339 (1958), as amended by 73 Stat. 141 (1959) 11

Enabling Act of Montana of February 22, 1889, 25 Stat. 676 ..... 3, 9, 11, 12

In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, Civil No. 4993 22

Montana Water Use Act, Laws of Montana (1973), Chapter 452 ..... 7, 8, 9, 20

New Mexico and Arizona Enabling Acts, Act of June 20, 1910, 36 Stat. 557 11

Oklahoma Enabling Act, 34 Stat. 267 (1906) 11

Rule 28.1 of the Rules of the Supreme Court of the United States 1

Senate Bill 76, Laws of Montana (1979), Chapter 697 .. 7, 8

United States, S. Rep. 755, 82nd Cong. 1st Sess. 2-5 .. 15, 20, 21, 22

Utah Enabling Act, 28 Stat. 107 (1894) 11

No. 81-_____

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA, et al.,

Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, the State of Montana and hundreds of private Petitioners, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 22, 1982, and clarified on April 5, 1982.

Each petitioner was a party to one or more of the cases decided by the Ninth Circuit in *Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation v. Adsit*, 668 F. 2d 1080 (February 22, 1982).[1] The respond-

[1]The petitioners in addition to the State of Montana are listed in Appendix A, *infra*. The statement required by Rule 28.1 of the Rules of the Supreme Court of the United States appears in Appendix B, *infra*.

ents are: the United States of America, the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, the Crow Tribe of Indians, the Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation and James Bowen, all appellants in the Ninth Circuit cases consolidated with *Adsit*.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 668 F. 2d 1080 (1982). The subsequent clarifying order has not yet been reported. The opinion and clarifying order are reproduced in Appendices C and D. The opinion of the United States District Court for the District of Montana, issued by Judges Battin and Hatfield, 484 F. Supp. 31 (D. Mont. 1979) appears in Appendix E.

JURISDICTION

The judgment of the Court of appeals for the Ninth Circuit was entered on February 22, 1982, and this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under the provisions of 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

Statutes and constitutional provisions involved are:

The Enabling Act of Montana of February 22, 1889, 25 Stat. 676, which in pertinent part provides:

> An Act • • • to enable the people of • • • Montana • • • to be admitted into the Union on an equal footing with the original states • • • § 4. • • • Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; • • •

Montana Constitution, Ordinance No. I (1889) which states in pertinent part:

> Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, • • •

Montana Constitution, Article I (1972), which states:

> All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

Montana Constitution, Article IX, Section 3 (1972), which states in pertinent part:

> Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
>
> (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.
>
> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
>
> (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

The McCarran Amendment, Act of July 10, 1952, 66 Stat. 560, 43 U. S. C. Section 666, which states:

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances:

Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. Section 1322, Public Law 280, which states:

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the Tribe occupying the particular Indian country or part thereof which would be affected by

such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. Section 1324, Public Law 280, which states:

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

The following statutes are reproduced in the Appendix:

Montana Water Use Act, Laws of Montana (1973), Chapter 452 (App. F);

Senate Bill 76, Laws of Montana (1979), Chapter 697 (App. G).

STATEMENT OF THE CASE

This case involves the question of whether the United States District Court for the District of Montana properly exercised its discretion in dismissing seven different complaints seeking to have the federal courts adjudicate water rights on and in the vicinity of Montana's seven Indian reservations. The complaints included Indian and other federal reserved water rights, as well as the water rights of the State of Montana and thousands of other parties.

The seven cases were filed over a period of approximately four years. The first was filed by the Northern Cheyenne Tribe on January 30, 1975,[1] after the Montana Department of Natural Resources and Conservation commenced state court proceedings to determine existing water rights in the area of the Reservation pursuant to Montana's Water Use Act of 1973 (App. F). Approximately

[1] *Northern Cheyenne Indian Tribe of the Northern Cheyenne Indian Reservation v. Tongue River Water Users Association, et al.*, No. CV-75-6-BLG, CA-79-4887.

two months later, the United States filed two other complaints in federal district court.[3]

Pending these first three actions, this Court decided the case of *Colorado River Water Conservation District v. United States*, 424 U. S. 800 (1976), holding that water adjudication proceedings in Colorado state courts could include all federal reserved water rights, including Indian reserved water rights, pursuant to the McCarran Amendment, 43 U. S. C. § 666. Also pending decision in these first three cases, the Montana legislature enacted amendments to Montana's Water Use Act by passing "Senate Bill 76" (App. G). These amendments required immediate state-wide adjudication of all existing water rights, including those reserved by the United States for itself and for the benefit of Indians and Indian Tribes. On April 5, 1979, approximately one month before that legislation became effective, the United States Attorney for the District of Montana filed four additional suits in federal court.[4] Like the three earlier cases, these actions sought federal court adjudication of various water rights, including Indian and other federal reserved water rights, and the rights of these petitioners.

On November 26, 1979, District Judges Battin and Hatfield granted motions to dismiss all seven cases holding

---

[3] *United States v. Tongue River Water Users Association, et al.*, No. CV-75-20-BLG, CA-80-3040, 80-3041, 80-3042; and *United States v. Big Horn Low Line Canal, et al.*, No. CV-75-34-BLG, CA-80-3062, 80-3063.

[4] *United States v. Aasheim, et al.*, No. CV-79-40-BLG, CA-80-3028, 80-3061; *United States v. Aageson, et al.*, No. CV-79-21-GF, CA-80-3032, 80-3044; *United States v. AMS Ranch, Inc., et al.*, No. CV-79-22-GF, CA-80-3045; and *United States v. Abell, et al.*, No. CV-79-33-M, CA-80-3036.

that considerations of "wise judicial administration" justified dismissal in favor of the more comprehensive on-going state court proceedings under Montana's Water Use Act. The District Court's Order (App. E) was appealed by the United States and the Indian Tribes who participated in the District Court proceedings. The Ninth Circuit Court of Appeals consolidated the appeals for review. The Ninth Circuit reversed the district court's dismissal of the complaints, holding that Indian water rights must be adjudicated in the federal courts and that the State of Montana lacked jurisdiction to adjudicate the Indian water rights. The court of appeals held that it was not "wise judicial administration" for the federal district courts to dismiss these cases, and that the state courts lacked jurisdiction over Indian water rights because Montana's Enabling Act and Constitution disclaimed jurisdiction over the Indian Water rights and because Montana had failed to assume jurisdiction over these rights pursuant to Public Law 280, 25 U. S. C. § 1322.

Although the complaints filed by the United States included non-Indian federal reserved water rights, the Ninth Circuit opinion was completely silent on the question of whether or not the district court properly dismissed those claims in deference to Montana's state court water adjudication proceedings.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's opinion on the effect of Montana's disclaimer provisions conflicts with decisions of this Court, and the decision of the Tenth Circuit in Jicarilla Apache Tribe v. United States.

This case involves the question of whether or not the courts of the State of Montana have jurisdiction to ad-

judicate federal water rights, including Indian water rights which the United States holds in trust for the various Indian tribes.

The State of Montana and all the private petitioners have recognized the existence of federal reserved water rights, and the fact that federally created rights must be determined in accordance with federal law while state created rights will be determined in accordance with state law. *See, United States v. District Court of Eagle County*, 401 U. S. 520, 525-26 (1971); *United States v. District Court in and for Water Division No. 5*, 401 U. S. 527, 529-30 (1971). The State of Montana has asserted only its legitimate governmental interests in attempting to adjudicate federal reserved water rights, including Indian water rights.

As is argued in Part III of this Petition, the State's interest is in completing a general state-wide adjudication of *all* rights, which must include all federal and Indian reserved rights in order to be effective. The Ninth Circuit has held, contrary to all existing case law, and statutory authority, that the State of Montana has no jurisdiction to regulate Indian water rights in any way.[5] The court based its opinion upon an incorrect and unprecedented interpretation of Montana's Constitution and the

---

[5]The Ninth Circuit opinion assumes throughout that the state courts will not give Indians and Indian tribes a "fair shake" in the adjudication of their water rights—a concept which this Court expressly rejected in *Colorado River Water Conservation District v. United States*, 424 U. S. 800, 812 (1976). *See also, State of South Dakota ex rel. Meierhenry v. Rippling Water Ranch, Inc.*, 531 F. Supp. 449, 454 (D. S. D. 1982).

Enabling Act under which Montana was admitted to the Union, 25 Stat. 676, § 4, cl. 2.[6]

The Enabling Act required Montana to include in its constitution a disclaimer by the people of Montana to the lands[7] owned by Indians or Indian tribes and an acknowledgement that those lands were to remain "under the absolute jurisdiction and control of" Congress until the title of the Indians or of the United States had been extinguished. Montana enacted its disclaimer of authority over Indian lands as part of its original State Constitution (Mont. Const. ord. no. 1, cl. 2 (1889)) and as part of its new Constitution. Mont. Const. art. I (1972).[8]

For almost one hundred years, this Court has made clear that the "absolute jurisdiction and control" language contained in Montana's disclaimer does not mean "exclusive" federal jurisdiction. *See, e. g., Draper v. United States*, 164 U. S. 240 (1896), interpreting Montana's disclaimer language. This Court has held that similar disclaimer language includes only proprietary interests, but

---

[6]This Enabling Act included Montana, Washington, North Dakota and South Dakota.

[7]Petitioners have never conceded that "lands" include water. That distinction, however, is not the subject of conflict between the circuit courts and this Court.

[8]Arizona, Idaho, New Mexico, Utah, and Wyoming have enabling acts or constitutional disclaimers essentially identical to the Enabling Act for Montana, North Dakota, South Dakota and Washington. *See* New Mexico and Arizona Enabling Acts, Act of June 20, 1910, 36 Stat. 557; Idaho Const. art. 21, sec. 19, ratified by Congress, 26 Stat. 215 (1890); Wyo. Const. art. 21, sec. 26, ratified by Congress, 26 Stat. 222 (1890); Utah Enabling Act, 28 Stat. 107, 108 (1894). *See also*, Oklahoma Enabling Act, 34 Stat. 267 (1906); Alaska Enabling Act, 72 Stat. 339 (1958), as amended by 73 Stat. 141 (1959).

that the state continues to have governmental interests. *Organized Village of Kake v. Egan*, 369 U. S. 60 (1962). This holding has not been disturbed by this Court.

The Ninth Circuit's opinion has rejected this Court's interpretation of disclaimer provisions. In addition, the Ninth Circuit's opinion is in direct conflict with the opinion of the Tenth Circuit Court of Appeals in *Jicarilla Apache Tribe v. United States*, 601 F. 2d 1116 (10th Cir. 1979), *cert. denied*, 444 U. S. 995 (1979). In that case, the Tenth Circuit held that language in a state disclaimer is not intended to oust the state from regulation of Indian property, and that disclaimer states, such as Montana, have jurisdiction under the terms of the McCarran Amendment, 43 U. S. C. § 666,[9] to adjudicate all federal water rights, including Indian reserved water rights. The Ninth Circuit held that the Tenth Circuit's decision erroneously ignored the distinction between the states with disclaimer provisions and those without them. *Adsit* (App. C at 35). The court held that the disclaimer provisions in Montana's Enabling Act barred Montana from exercising jurisdiction over Indian water rights.[10] In construing the disclaimer provisions, the Ninth Circuit made no distinction between the proprietary interests and

---

[9]The McCarran Amendment (quoted in its entirety in "Constitutional Provisions and Statutes Involved" above) waives the immunity of the United States in suits to adjudicate water rights.

[10]As noted in the "Statement of the Case," *supra*, the Ninth Circuit Opinion was inexplicably silent on the issue of Montana's jurisdiction to adjudicate other federal water rights which were at issue in the case. The opinion apparently confused Indian water rights with all other federal reserved water rights.

governmental functions long recognized by this Court (*Organized Village of Kake, supra*), and by the Ninth Circuit itself in *White Mountain Apache Tribe v. Arizona*, 649 F. 2d 1274 (9th Cir. 1981). In the present case, the Ninth Circuit stated that the Tenth Circuit went "too far by relying on the distinction between proprietary and governmental functions drawn in *Kake* and *White Mountain Apache Tribe*." *Adsit* (App. C at 38). Curiously, the Ninth Circuit overlooked the fact that the Tenth Circuit opinion in *Jicarilla, supra*, was issued more than a year *before* the Ninth Circuit decision in *White Mountain Apache Tribe v. Arizona*. The *Jicarilla* decision did not and could not possibly have relied upon *White Mountain*. In fact, in *White Mountain*, the Ninth Circuit relied on *Jicarilla* for the very proposition that the same court in *Adsit* impliedly reversed, namely, that proprietary interests only were disclaimed in disclaimer provisions. *See, White Mountain Apache Tribe v. Arizona*, 649 F. 2d at 1280.

In justifying its express disagreement with the Tenth Circuit's decision in *Jicarilla*, the Ninth Circuit asserted that there was no other case brought to its attention permitting a disclaimer state to adjudicate Indian water rights. *Adsit* (App. C at 35). This is not true. The case of *State ex rel. Reynolds v. Lewis*, 88 N. M. 636, 545 P. 2d 1014 (1976), was brought to the Ninth Circuit's attention in at least two briefs. Br. of Cale Crowley, at

17-18; Opening Br. of Northern Cheyenne Tribe at 34, n. 33.[11]

The holding of the Ninth Circuit in this case, in contravention of the holdings of this Court and every other court which has dealt with the disclaimer issue, is underscored by the position of the Solicitor General for the United States as stated to this Court in his amicus brief filed in *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136 (1980). In that case, the White Mountain Apache Tribe argued that Arizona's disclaimer provisions prohibited the state from imposing any taxes upon Indians or those doing business with Indians. In his brief, the Solicitor General conceded that the contention that the Arizona disclaimer provisions (essentially identical to Montana's) included a disclaimer of all governmental interests and jurisdiction was a "settled question" which did "not warrant review by this Court." Br. U. S. as *Am. Cur.* 12-13. Certiorari was not granted on that issue. Apparently, the United States still does not subscribe to the position urged by the Tribes and adopted by the Ninth Circuit in this case. The United States asked for and received an order "clarifying" the opinion of the Ninth Circuit so that the disclaimer argument was attributed only to the Tribes and not to the United States (App. D).

The extraordinary conclusion of the Ninth Circuit that disclaimer states have no governmental authority within

---

[11]Recently, the Superior Court for the State of Washington issued a memorandum opinion holding that federal water rights, including those reserved for the Yakima Indian Nation, can be adjudicated in the state proceedings. *The State of Washington, Department of Ecology v. Acquavella*, Superior Court for the State of Washington for Yakima County, No. 77-2-01484-5 (February 16, 1982).

Indian reservations with regard to water rights should be reviewed by this Court.

II. The Ninth Circuit's decision conflicts with this Court's interpretation of the McCarran Amendment and Public Law 280 in Colorado River Water Conservation District v. United States and with the Tenth Circuit's decision in Jicarilla Apache Tribe v. United States.

The Ninth Circuit's holding that the McCarran Amendment did not apply to disclaimer states and its interpretation of Public Law 280 ignores the holdings of this Court and is in complete conflict with the Tenth Circuit in *Jicarilla Apache Tribe v. United States, supra.*

The McCarran Amendment was enacted by Congress to allow the joinder of the United States as a defendant in state court water adjudication proceedings. Congress recognized that unless it removed the immunity of the United States from suit, state court decrees were ineffective as to the water rights held by the United States, S. Rep. 755, 82nd Cong. 1st Sess. 2-5 (App. J at 146-153). The McCarran Amendment "was introduced for the very purpose of correcting this situation and the evil growing out of such immunity." S. Rep. 755 at 5 (App. J at 153). The problem was significant to the "western states" (the bulk of which are disclaimer states)[12] because they had adopted

---

[12]Of the states west of the 100th Meridian (without question "Western States") Washington, Idaho, Montana, Wyoming, Utah, New Mexico, Arizona and Alaska are disclaimer states. Alaska and Hawaii were territories in 1952 when the McCarran Amendment was passed.

the doctrine of prior appropriation and because at least one-third of each western state is federal land.[13]

Although Congress designed the Amendment to include all western states, including these disclaimer states, the Ninth Circuit opinion limits the McCarran Amendment's application to non-disclaimer states: Oregon, California, Colorado and Nevada. This holding eviscerates the Amendment and is in complete conflict with the Tenth Circuit's holding in *Jicarilla Apache Tribe v. United States, supra.*[14]

---

[13]

STATE	FEDERAL LANDS (Excluding Trust Lands) (Acres)*	INDIAN TRUST LANDS (Acres)**	PERCENTAGE OF TOTAL STATE LANDS
Alaska	326,925,560.5	426,765.3	89.57
Arizona	32,014,276.1	19,897,231.8	71.42
California	46,702,125	572,771.07	47.18
Colorado	23,670,946.5	755,956.5	36.74
Idaho	33,759,571.6	826,602.8	65.34
Montana	27,740,572.2	5,215,978.67	35.33
Nevada	60,506,114.1	1,154,298.2	87.75
New Mexico	25,873,744.7	7,449,187.4	42.85
Oregon	32,313,687.9	758,537.34	53.69
Utah	33,529,967.4	2,283,986.7	67.96
Washington	12,472,703.7	2,498,293.5	35.07
Wyoming	30,329,555.5	1,887,914.1	51.68

*Source: Bureau of Land Management, U. S. Dep't of Interior, *Public Land Statistics* 1980.

**Source: Bureau of Indian Affairs, U. S. Dep't of Interior, *Annual Report of Indian Lands* (1980).

[14]There is no authority supporting the Ninth Circuit opinion. In *Colorado River Water Conservation District, supra,* this Court held that by naming the United States as a defendant a state may assert jurisdiction over the water rights of Indian tribes which would have been immune from suits in state court absent the McCarran Amendment. 424 U. S. at 812. There is nothing

(Continued on following page)

The Ninth Circuit opinion ignored the holdings of this Court with regard to the application of "Public Law 280," Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. §§ 1322 *et seq.* Public Law 280 became law in 1953, over a year *after* enactment of the McCarran Amendment. It facilitates the transfer of civil and criminal jurisdiction over Indian country to states if certain procedures are followed. *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U. S. 463, 490-91 (1979). There are some restrictions on this possible assumption of jurisdiction, however, making Public Law 280 completely inapplicable to the adjudication of water rights. 25 U. S. C. § 1322(b) states that:

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(Continued from previous page)

in *Colorado River* requiring (or even suggesting) that the opinion be limited to non-disclaimer states, *i. e.*, Colorado, California, Nevada and Oregon. In fact, in *Colorado River*, this Court, discussing procedures to solve problems of water allocation in the Southwest, referred to the water adjudication procedures established by various states, including Arizona and New Mexico, both disclaimer states, without distinguishing them from Colorado. 424 U. S. at 804, n. 2.

The Ninth Circuit's decision overlooked this express language making Public Law 280 inapplicable to the adjudication of water rights, and erroneously held that Montana could have assumed jurisdiction over Indian water rights had the State followed the procedures set forth in Public Law 280.[15] The Ninth Circuit reasoned that Montana's failure to follow those procedures left the State without any jurisdiction to adjudicate the Indian water rights in issue.

The Ninth Circuit's own previously consistent position had been that the law affecting those areas excluded or restricted from the otherwise general extension of jurisdiction by Public Law 280 remained as it existed prior to passage of Public Law 280. In fact, that was the holding of this Court in *Bryan v. Itasca County*, 426 U. S. 373 (1976). Thus, the law affecting state jurisdiction over Indian water rights as it existed prior to passage of Public Law 280 is defined by the pre-existing McCarran Amendment. In *Bryan*, this Court cited with approval the Ninth Circuit's decision in *Kirkwood v. Arenas*, 243 F. 2d 863, 865-866 (1957). *Bryan v. Itasca County*, 426 U. S. at 391. The Ninth Circuit had consistently followed the rationale of *Bryan* until its decision in this case. *See, e. g., White Mountain Apache Tribe v. Arizona, supra*, 649 F. 2d at 1279; *Fort Mojave Tribe v. County of San Bernardino*, 543 F. 2d 1253, 1257 (9th Cir. 1976).

In addition to being in direct conflict with this Court's interpretation of the effect of Public Law 280 in *Bryan*,

---

[15]The petitioners have never contended that it is possible for the State to obtain jurisdiction over Indian water rights pursuant to Public Law 280.

the decision of the Ninth Circuit is in conflict with the express language of this Court in *Colorado River Conservation District, supra.* In that case, this Court stated:

> . . . This provision in both sections [Public Law 280, 25 U. S. C. § 1322(b) and 28 U. S. C. § 1360(b)], however, only qualifies the import of the general consent to state jurisdiction given by those sections. It does not purport to limit the special consent to jurisdiction given by the McCarran Amendment. A contrary conclusion is foreclosed by the principle of construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment. [citation omitted] 424 U. S. at 812-813 n. 20.

This language was given special emphasis by the Tenth Circuit in *Jicarilla, supra,* 601 F. 2d at 1132, and the Tenth Circuit there correctly held that a state's jurisdiction to adjudicate water rights remains as it existed prior to the enactment of "Public Law 280", and as defined by the McCarran Amendment.

The Ninth Circuit's refusal to follow the holdings of this Court and its conflict with the holding of the Tenth Circuit on the effect of Public Law 280 and the McCarran Amendment on state courts' jurisdiction to adjudicate Indian water rights justify review by this Court.

III. The Ninth Circuit opinion conflicts with this Court's holding in Colorado River Water Conservation District v. United States that the McCarran Amendment grants state courts jurisdiction to adjudicate Indian water rights in general stream adjudications.

The Ninth Circuit Court of Appeals stands alone in failing to recognize the clear purpose of the McCarran Amendment was to provide for a comprehensive adjudication of all rights within a water system, and to permit adjudication of those rights in the state courts. *See* S. Rep. 755, 82nd Cong. 1st Sess. The decision of the Ninth Circuit requires that Indian water rights be adjudicated in federal court at the same time as non-Indian water rights are being adjudicated under Montana's Water Use Act. The question of which was the proper forum for the adjudication of non-Indian federal reserved water rights was not addressed by the Ninth Circuit. The Ninth Circuit opinion thus requires Montanans, including all of these petitioners, to participate in piecemeal adjudications—the malady which the McCarran Amendment was designed to cure. The Ninth Circuit's holding is contrary to this Court's holding in *Colorado River, supra,* in which this Court stated:

> . . . a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. 424 U. S. at 819.

Similarly, the Ninth Circuit stands alone in its refusal to recognize that the policy underlying the McCarran Amendment is that state adjudication procedures and state courts should be used for the adjudication of all federal water rights, including Indian water rights. This Court has consistently recognized that deference should be given to state water adjudication systems. *Id. See also United States v. New Mexico,* 438 U. S. 696, 702 (1978). The Montana Water Use Act (App. F, G) is

precisely the type of water adjudication process which Congress envisioned in passing the McCarran Amendment. S. Rep. 755 at 5 (App. J at 154).

Finally, the Ninth Circuit opinion is contrary to the holding of this Court in *Colorado River* because it failed to recognize that the extraordinary circumstances warranting dismissal of the federal cases exist here. This Court in *Colorado River* outlined the factors which must exist before a district court may properly dismiss this type of case. The district court exercised its discretion in ruling that all of those factors were present. The Ninth Circuit failed to give proper deference to the district court's discretion because the Ninth Circuit refused to recognize the existence of those factors, including the paramount factor of the McCarran Amendment and its policies.

IV. The Ninth Circuit opinion raises serious and recurring problems concerning efforts by the states to adjudicate water rights.

Various courts have struggled with the issues now before this Court, many very recently.[16]

---

[16]The Ninth Circuit opinion consolidated the seven cases from Montana which involved thousands of defendants. Argued on the same day, but not consolidated with the Montana cases, were several cases from Arizona, which had opinions issued one and two days after the *Adsit* opinion: *San Carlos Apache Tribe of Arizona v. The State of Arizona*, 668 F. 2d 1093 (February 23, 1982); *Navajo Nation v. United States*, 668 F. 2d 1100 (9th Cir., February 24, 1982). *See also, The State of Washington, Department of Ecology v. Acquavella*, Superior Court for the State of Washington for Yakima County, No. 77-2-01484-5 (February 16, 1982); *Rippling Water Ranch, supra.*

In 1951 Congress recognized that:

> It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State Courts. S. Rep. 755 at 5 (App. J at 153).

It was this recognition that was the impetus behind the McCarran Amendment.

The Ninth Circuit opinion has eviscerated the McCarran Amendment and, as discussed in Part III above, has required piecemeal water rights adjudications. Not only are these petitioners inconvenienced and caused great expense by having to assert their water rights in both federal and state courts, but every water claimant is relegated to uncertainty about his water rights. The determination of one court will generate litigation in another court. The result is perpetual litigation and the chaos which Congress envisioned in the absence of the McCarran Amendment.

This piecemeal litigation problem faces water claimants in all nine of the states within the Ninth Circuit. The uncertainty afflicts water claimants in the six states making up the Tenth Circuit and seven states making up the Eighth Circuit. Illustrative of the problem is the crisis facing the State of Wyoming in *In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming*, Civil No. 4993, Fifth Judicial District, State of Wyoming, in which the state courts are attempting to adjudicate

all water rights, including federal reserved water rights. The State of Wyoming has recognized that the conflict between the Ninth and Tenth Circuits on the question of whether state courts can adjudicate federal reserved water rights must be resolved in order to assure that the state courts have subject matter jurisdiction. The State of Wyoming has asked that this question be certified to the Wyoming Supreme Court, in an effort to bring its case before the United States Supreme Court.

The confusion facing water claimants in all of these states can only be cured by a final determination by this Court. Only by reviewing this case will these crucial issues be settled.

CONCLUSION

For all these reasons, a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL T. GREELEY
Attorney General for the
State of Montana

HELENA S. MACLAY
DEIRDRE BOGGS
Special Assistant Attorneys General
P. O. Box 8957
Missoula, Montana 59807
(406) 721-5440

Attorneys for Petitioner
State of Montana

CALE CROWLEY
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH
P. O. Box 2529
Billings, Montana 59103

MAURICE R. COLBERG, JR.
HIBBS, SWEENEY, COLBERG,
JENSEN & KOESSLER
P. O. Box 2175
Billings, Montana 59103

JAMES E. SEYKORA
BERT W. KRONMILLER
P. O. Drawer S
Hardin, Montana 59034

DOUGLAS Y. FREEMAN
631 N. Center
Hardin, Montana 59034

Counsel for Private Petitioners

Office - Supreme Court, U.S.
FILED
MAY 21 1982
ALEXANDER L. STEVAS,
CLERK

81-2188

No. 81-.....

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA, et al.,

Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL T. GREELY
Attorney General for
the State of Montana

HELENA S. MACLAY
DEIRDRE BOGGS
Special Assistant Attorneys General
P. O. Box 8957
Missoula, Montana 59807
(406) 721-5440

Counsel for State of Montana
(and counsel to be served)

(Additional counsel on inside cover)

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Page

Appendix A

List of Private Petitioners 1

Appendix B

List of Parent Companies, Subsidiaries (except wholly owned subsidiaries) and Affiliates for Corporations, Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States. 23

Appendix C

Opinion, *Northern Cheyenne Tribe v. Adsit*, 668 F. 2d 1080 (9th Cir., February 22, 1982). 26

Appendix D

Order Clarifying Opinion by Ninth Circuit Court of Appeals (April 5, 1982). 51

Appendix E

Memorandum and Order, *Northern Cheyenne Tribe v. Tongue River Water Users Association*, 484 F. Supp. 31 (D. Mont. 1979). 53

Appendix F

Montana Water Use Act, Laws of Montana (1973), Ch. 452, as codified in §§ 89-865 through 89-8-111, R. C. M. 1947, as amended. 62

Appendix G

Senate Bill 76, Laws of Montana (1979), Ch. 697 .. 102

Appendix H

United States' Petition to the Montana Supreme Court (filed April 19, 1982) and Orders of the Montana Supreme Court attached as exhibits. ... 133

TABLE OF CONTENTS—Continued

Page

Appendix I

Final Order of the Montana Supreme Court *In the Matter of the Petition of the United States for a Stay of Proceedings* (filed April 29, 1982) .. 143

Appendix J

S. Rep. No. 755, 82nd Cong., 1st Sess. (1951) 145

S. Rep. No. 755, Part 2, 82nd Cong., 2nd Sess. (1952) 164

APPENDIX A

Petitioners represented by CALE CROWLEY, CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH

Consolidation Coal Co.
Gulf Oil Corporation
Jeans Fork Cattle Co.
Montana Power Company
Philbrick, Newell and Rita R.
Roman Catholic Bishop Off.
Roman Catholic Bishop of Great Falls
St. Labre Mission
Banderob, F. C.
Bureau of Catholic Indian Missions
Daum, Irma M.
Davison, William H.
Downs, Robert F.
Fowler, Muriel F.
Herren, Joe
Hoehne, Mary G.
Kemph Land & Livestock Co.
Korber, Eileene J.
Kolb Brothers Corp.
Kolb, O. A.
Mottram, Geraldine R.
Murphy, Maurice Estate of
Roberts, Frances E.
Roberts, Victor R.
Ruff, Lillian
Shaules, D. K.
Siewart, Edward
Soap Creek Cattle Co.
Sullivan, Kathleen P.
Thompson Realty Co.
Thornton, Royal J.
Trask Cattle Co.
Walker, Virginia B.
Walter, Frank
Wilson, Archie & Sons, Inc.
Wilson Land & Cattle Company
Donald W. Berry
Archie Lewis
Joann Marlenee
Ronald C. Marlenee
Robert E. Olson
The Town of Culbertson
Arthur Boyum
Arlo M. Anderson
Linda R. Bellanger
Mina R. Belson
Allen V. Bummer
Catherine Darchuk
Caroline E. Davis
Raymond Garberg
Richard Gaustad
Richard G. Handy
Cox, Taylor
Hammond, George J. and JoAnnetta
Peabody Coal Company
Province of St. Joseph of the Capuchin Order
Quarter Circle U Ranch
Shell Oil Co.
Ballensky, A. G., Co.
Blake, Georgia H.
Daum, William V.

Downs, Gladys
Fowler, John Elisha
Gallup, Deborah D.
Herren, Opal G.
Kratochvil, W. James
Kolb, Clara
Krieg, Frederick C. and Lottie J.
Paquette, Gardena
Ruff, Joseph H.
Scott, John R.
Shaules, Frances V.
Siewart, Walter
Swihart, Charles R.
Thornton, Mildred W.
Torske Farm, Inc.
Vale Creek Ranch, Inc.
Walter, Clarence
Walton, William H.
Wilson, Archie Lee
William O. Berry
Dale H. Marlenee
Lanny P. Marlenee
Oscar W. and Lucille M. Olson
Tarum Farms, Inc.
Beulah I. Smestad
Anna Lee Boyum
Alfred A. Bellanger
Evan K. Benson
Leonard Bummer
Marlene Bummer
Tom W. Davis
Jesse C. Crury
Echo Garberg
I. H. Halverson, a/k/a Irwin Halverson
Alma G. Handy
Glenn Hanrahan
Hellickson Brothers, Inc.
Bernard Langer
Winifred M. Lien
Edna B. Murphy
Melvin Thunem
OrLynn C. Vois
Carloyn Wilcoxon
Fladager Enterprises, Inc.
Bertha M. Gustitis
Ralph W. Susag
Sundby Enterprises
Eleanor Teigen
Fay Taylor Phillips
Charles Andrilenas
City of Plentywood
Dale Fellon
Howard J. Holtan
Noel L. Sundheim
Thornwood Corporation
Lowell O. Burgett
Harold E. Hammerberg
James C. Hanrahan
Lee Ranch, Inc.
Ruth M. Matson and Arthur J. Matson
Norma H. and William D. Alexander
B. Eveyln and Wilford R. Casterline
Mildred E. Christofferson
John H. and Nella R. Dethman
Fay Crusch Ranch
Lewis H. Gobbs
Beverly Gray
Helena Harvey
Henry Hoye
G. Edward Johnson
Dora E. Johnson

Dora and Knud Knudsen
Eugene and Lila J. Larsen
Eileen V. and Glen L. Larsen
Mattelin Hereford Ranch, Inc.
Dorothy M. and Ove Nelson
Gerald E. Olsen
Letty Peterson
Lawrence D. Romo
James and Ramona H. Ross
Alice M. and Morris J. Royan
Carolyn M. and Robert L. Smith
Theodore O. Thompson
Lula B. Traeger
H. H. Wheeler
William Harmon Farms, Incorporated
Robert P. Wilson
Lillian Hatfield
Martin L. Reyner
Nelson Ranch, Inc.
Eldon S. Picard
Big Muddy Grazing Association
Martha Anderson
Lewis Archambeault
Miner Farms, Inc.
Jack G. Shanks
David G. Hanrahan
Ruth Hanrahan
Martin Johnson
Bernard L. Lien
Chester N. Murphy
Odegaard Land & Livestock Co.
Dorothy Thunem
Sheridian Wilcoxon
Joyce E. Chapman
Charles M. Gustitis
Hazel V. Rheault
Clarice M. T. Susag
Palmer E. Teigen
Richard M. Anderson
Victor DeTienne
Alice Fellon
Lois P. Holtan
Barney and Marian Simonson
Bertha Sundheim
Herb Korf
Fernande Fugere and Adrienne Hope Fugere
Delores Hoversland and Wilhelm Hoversland
O & R Ranch
Paulsen Bros.
Darold V. and Linda J. Anderson
Duane E. and Rosemary A. Christofferson
Delores J. Engelke
Howard L. Gobbs
Alice C. and Albert R. Granley
Dean Harmon
Jim Hatfield
Paul L. and Sylvia J. Hoffman
Gustav E. Johnson
Ray Johnson
Janice (Jane) E. and Wayne C. Knudsen
Alvin O. and C. Josephine Lien
Joseph F. May
Donald Oelkers
Paul and Sophie Panasuk
Herbert W. Picard

Norman A. Ronning
Nellie E. and Fred Ross
Royan Ranch, Inc.
Arthur Swanson
Daniel and Gladys M. Tietz
Wheeler-Bartley Ranch, Inc.
Frederick T. Wix
Mabel H. Wilson
Walter S. Young
Irwing Hoye
James Robert Traeger
Leota Hoye
Town of Bainville
Chinook Swindle
Helen Archambeault
G. T. Archambeault
Lund Hereford Ranch, Inc.
James L. Shanks
Golden C. Birkowski
Louise Christiana
Winnie Davis
Hansen Farming Co.
Gary Klind
Matador Ranch, Inc.
Eugene R. and Idell R. Nichol
Homer V. Peters
Valley County
Norheim Farming Corp.
John Dietrich, Jr.
William F. Anderson
Bi-Lo-Ji Farms, Inc.
Canen Ranch, Inc.
Emma and Graydon Edwards
Thomas J. Fisher
Vivien M. Foust
Funk Ranch, Inc.
Melvin Jensen
Lloyd L. Jones
Lacock Bros, a partnership consisting of Sherman Lacock and Jessie L. Lacock, Jr.
Walter K. and Frances C. Newton
Thomas R. and Lucille P. Rice
Sunnyside Golf
Sandra D. and Leonard B. Swenson
John Walton, owner of part of old Glasgow Angus Ranch
Meadowlark Land & Cattle Co.
Boucher Ranch, Inc.
Mitchel J. Etchart
Paulette Jakanoski
Nancy Etchart
Danielle Anderson
Denise Etchart
Brian Etchart
Otto Baltrusch, Jr.
Arthur O. Beirwagen
Beirwagen Farms
Lois V. Veirwagen
H. H. Bitz
Ronald A. Bitz
Hugh D. Dumas
Margaret A. Flaskerud
Ross H. Friede
City of Havre
Heart-Bar-R Inc.
Lloyd D. Kaercher
Helen A. Kanning
John B. Kuhr, Trustee
Paul J. Kuhr
Lewis M. Lineweaver
Joan Olson

Russell T. Olson
Scheele Ranch, Inc.
Dorothy Ann Solomon
Clifford Springer
Raymond W. Tow
Louise Clack Wigmore
Audrey E. Cox
Lee Cronk
Richard Cronk
E-T Ranch Co.
Nicholas B. Faber
Robert W. Finke
Beverly A. Fisher
Lillian B. Graham
Earl A. Britsch
Donald Davenport
City of Glasgow
Edith Kappel
Leonard H. Langen
Joyce J. F. Miller, a/k/a Joyce J. Ferguson
Mabel Soper Estate
Berniece M. Wolf
Jerome C. Hammond
Beil Ranch, Inc.
Bernice M. Boreson
Helen and Albert Craig, Jr.
Lee Edward Ellsworth, Lee Elsworth, Jr. and Katie Elsworth
Hinsdale Livestock Co., Inc.
Dewey and Helen Johnson
Dorval Kittleson
Harold and Edna Luraas
McIntyre Ranch
Floyd Nelson, Jr.
John Porteen
Mary Shipp
Swanson Ranch, Inc.
Guy E. Wagner
Gerald Fossum
Frank D. Stuber
Hughes Ranch, Inc.
Black Ranch, Inc.
Mark S. Etchart
Rita Gallagher
Paul Etchart
Colette Stebleton
Diane Etchart
John C. Rorvik and Donna J. Rorvik
William H. Baltrusch
Emma P. Beirwagen
June L. Beirwagen
Elizabeth J. Bitz
H. H. Bitz Land Co.
Thomas W. Connolly
Olive M. Dumas
Lacene M. Friede
Howard W. Hammond
Havre Lodge No. 1201 B.P.O.E.
Joseph H. Heavey, Jr.
Lorn H. Kaercher
Beverly L. Kuhr
P. Kuhr (for Havre Irrig. Co.)
Peter J. Kuhr
Edward F. Olson
Marjorie V. Olson
Curtis A. Reum
Estate of Mildred Sollien
Edmond C. Solomon
Carrie L. Tow
William B. Verploegen
James W. Barber & Sons, Inc.
Robert J. Cox
Cronk Ranch, Inc.
Leonard Drugge
Faber Cattle Co.
Patricia Faber

Ben P. Fisher
Charles A. Graham
Elvard S. Hedstrom
Ben F. Hofeldt
Douglas F. Hofeldt
Roy L. Hofeldt
James E. Jenks
Dorothy May Knudson
Aaron B. Lacox
Benjamin H. Math
Meissner Ranches, Inc.
Flora M. Paulson
Walter Paulson
Ray C. Ramberg
Hazel E. Rolston
Frances H. Schafer
Olive M. Sheppard
Webster Thackery
Thaine Warren, Trustee
Rolland Wirt
William W. Young
Leonard F. Zellmer
Virgil Jurenka
Norris W. and Opal C. Harrison
Harold Jensen
Klingler, Inc.
Charles and Dorothy Lineweaver
Ethel V. McSloy
Fred and Sylvia L. Mohar
Betty Ann and James K. Nemetz
Warren Ross
John T. and Mary Ann Stevenson
Marion Wilson
Clark A. Hofeldt
Rodney B. Hofeldt
JMS Ranch, Inc.
Thora Finke Jennings (Allderdice)
Neil Looby
Meissner Brothers
John G. Overcast
Harold J. Paulson
Erna Ramberg
Red Rock Land Corp.
William D. Ross
Dale J. Sheppard
Darrell W. Swick
Turner Colony
Gloria Wirt
Una M. Young
Doris A. Zellmer
Anderson Land Co.
Estate of George C. Blackwood
Ila M. and Wilbur J. Hensler
Ole Jensen
William Hinebauch
Marilyn J. Lybeck
Berg-Melby Corporation
Estate of Edward Molitor
Louie Petrie Ranch
Andrew and Loretta P. Schwan
Arthur John Tilleman
Helen A. and John W. Young

Petitioners represented by MAURICE R. COLBERG, JR., HIBBS, SWEENEY, COLBERG, JENSEN & KOESSLER

Ahern, Raleigh I.
Alexander, Mary Ann
Anderson, Richard J.
Ashenhurst, Gene and Dorothy H.
Ashenhurst Ranch, Inc.
Baber, Sadie F.
Ball, John D.
Bird, Julia A.
Bumgardner, Eva
Baker, Verna S.
Bird, Harold W. and Anna M.
Benge, Dale V.
Bumgardner, Charles H.
Burnsides, Hazel
Bumgardner, George
Batey, Ray and Jane Doe
Bug Ranch Co.
Butts, Calvin H.
Baber, George P.
Bird, Anna M.
Butts, Joy
Burnsides, Wayne, estate
Brown, Albert, Jr.
Curran, Joe W.
Canyon Creek Cattle Company
Clark, Walter L.
Coykendall, Eltha Muriel
Clark, Walter and Jane Doe
Clark, Elizabeth D.
Curran, Helen E.
Giesecke Bros.
Giesecke, Richard W.
Giesecke, W. Ralph
Green, Michael
Golder, Nick
Harvey, Frank D. and Rino
Holmes, George B. and Dixie L.
Howard and Son, Inc.
Hana, Alice
Hanna, Richard R. and Alice
Harwood, Hubert
Hogan, Richard Lane
Hollowell, Newton A. and Bessie C.
Horizon Equipment Co.
Hutchison, Richard A.
Cotten, Ellen E.
Combs Ranch, Inc.
Carey, Norman
Dodds, J. E.
Davis, W. M. and Mary Lou
Davidson, Mrs. Verdie P.
Darran, Clair and May E.
Dean, Walter B., Jr.
Dent, Joe S. and Delores L.
Doak, Deming
Dodge, Carl A.
Davidson, George
Elder, Alexander B.
Finlayson, Harry R. and Phoebe Ann
Fjell, Elmer
Fletcher, Ted or Peggy
Flowers, William R.
Forman, Ralph L.
Frankl, Bert
Fulmer, Genie Philbrick
Fessler, Eugene

Fletcher, Gladys
Fox, Elsie R.
Flowers, Mabel C.
Frette, Raymond N.
Fletcher, Vern
Faddis-Kennedy Cattle Co.
Flowers, John L. Estate
Fortune, Marilyn
Fortune, Vern
Frette, Noreen
Golder Ranch, Inc.
Greenwood, Russell E.
Gresens, Neal L. and Irene
Groom, Thurman
Garfield, Russell and Genie
Green, Kirk and Dorothy
Greenwood, Carol S.
Hayes, Perry W.
Howard, Robert L. and Ingeborg
Hope, Edwin E.
Harstadt, John and Jane Doe
Harwood, Hubert
Hunt, H. L.
Hunt Oil Co.
Hults, Ralph M.
Hardy Land & Livestock Co.
Harstad, Eleanor A.
Hutchison, Dorothy
Janson, Betty R.
Jordan, Ruth
Jones, Charles A.
Jones Bros. Livestock Co.
Johnson, Arienne
Johnson, Torrey B.
Jones Land and Livestock Co.
Jones, Helen M.
Kirkemo, Harold
Knobloch, Jack
Knobloch, Albert
Knobloch Bros.
Kennedy, J. R. Porter
Kennedy, Robert S.
Ladson, Roger
Landers, H. D. and Margaret
Larsen, Chester
Larsen Ranch
Larsen Land and Livestock
Lenyard, Carl W. and Katherine
Lange, Francis H. and Jean A.
Leatherberry, Alfred and Maxine
Lee, Robert A. and Evelyn M.
Lei, James E. and Jeannette
Lee, Bonnie M.
LeVeque, P. V.
Larson, Chester and Jane Doe
Lange, Frank and Jane Doe
Lodson, Roger G.
Lodson, Sherryl
Lanjohn, Patricia Davidson
Lei, Oral, Ranch, Inc.
LeVeque, Evangeline M.
LeVeque, Mary P.
Lockie, John, Ranch, Inc.
Mathis, James S. and Catherine
Mees, Dora
Mees Hereford Ranch
Miller, Gladys B.
Miller, Jesse J.
Moffitt, James L.

Morgan, L. C.
McFarland, William C.
McFarland, Mickey and Marcia
McFarland, Hugh C.
McKelvey, Glenn and Eva
Mann, Ruth Alberta
Mobley Ranch, Inc.
Murry, W. D.
Murry, Jack R.
McFarland, Lynn
McLean, Bruce
Markland, Charles H. and Nellie
Martin, Donald R.
Mobley, Herbert O., Jr.
Mobley, John R.
Mees, LaVon, Trustee
Moreland, Elta M.
Moreland, John W., Jr.
Morgan, E. S.
Mees, Mark C.
Moffitt, Phyllis B.
Nance Cattle Company
Nansel, Arlo and Ruth M.
Nixon, Robert and Maxine
Ochsner, Jay Donald and Fern
Orr, Alice
Orcutt, J. Bruce
Ostrom, Mary Jane
Ochsner's Inc.
Orcutt, Dezzie M.
Philbrick, Newell B. and Rita R.
Phillips, Carl
Popp, John W. and Nell I.
Powell, Keith B.
Polich, Arthur W.
Parkins, Charles F.
Perry, D. L.
Philbrick D K Ranch, Inc.
Phillips, Patricia A.
Phillips, Ruth
Polich, Vesta L.
Phillips, H. I.
Petre, Preston
Petre, Stuart O.
Parking, Charles Finley
Ravenscroft, Francis J.
Rash, Marion
Ramer, Sydney L.
Rue, Judy A. and Victor
Randolph, Edmund
Schoonover, John H. and Agatha
Snider, James W.
Snodgrass, Albert and Alice
Star Printing Company
Sterling, Donald and Daisy
Sufficool, John E.
Schroeder, Josephine
Sorenson, Leland
Stanley, Don
Sprague, Jean H.
Sprague, Hulda
Shook, Glen E. and Laurel
Smith, Larry and Dorothy
Shaudel, Robert G.
Shy, Robert J. and Anna M.
Severson, Geo S. and Marjorie R.
Steadman, Alvin
Soukup, Betty Lou
Schaudel, Robert G.
Shaver, Boyd
Shaver, Marian E.
Snider, Merle Estill
Spear O Ranch Company

Stanley, Richard R.
Stuart, Peter
Steadman, Josephine
Stanley, Raymond L.
Saddler, R. J.
Saddler, Mable S.
Tongue River Electric Cooperative
Trusler, Inc.
Trusler, William C.
Trusler, L. D. and Adaline
Trusler, William C.
Terrett Ranch, Inc.
T Triangle Ranches, Inc.
Taylor, Walter J.
Thompson, O. and Mildrid
Thompson, Sigurd
Tongue River Water Users Association
Trainer, Jesse F and Fern
Turner, David S. and Patricia
Tennant, Jean E.
Trusler, Jacqueline
Trusler, Woodrow W.
Taylor, Shirley H.
Taylor, Walter J.
Thompson, Sigurd
Terrett, Julian, Jr., Trustee
Tongue & Yellowstone Irrigation District
Viall, Lilian H.
Valentine, Christine S. J.
Van Elsen, Monica
Waldie, Ervin A.
Williams, E. L. (for Goldie)
Wimer, Tom and Donna
Wood, Eugene
Woodard Ranches, Inc.
Weinburg, Harry
Wells, Wesley and Evelyn
Wilson, Carl C.
Wetherelt, Francis and Vera Lei
Ward, Willis, Inc.
Williams, William O., deceased
Wood, Mae
Younglund, Dennis
Zier, William D.
Zimmer, Max
Zimmer, Walter
Zier, Alice L.
Allen, E. O.
Allen, Edna
Allen, C. M. & Son
Allen Cattle Company
Alderman Co., Inc.
Barnard, Katherine
Brown Cattle Co.
Brown, Willie B.
Bailey, John L.
Broadus, Inc.
Broadus, Margaret C. c/o Hugh W. Broadus
Carpenter, Marjorie Irene
Carey, Del
Charles Wood Ranch, Inc.
Colvin, Dorie Lou
Choate, Alice
Cain, Wreatha
Cain, Oscar Donald
Cain, Gladys
Dent, Joe S.
Dent, DeLores L.
Dent, Ricki J.
Double H Ranch, Inc.
Dunning, James B.
Dunning, Elsie M.
Dalzell, D. H. as to the rights of Ray Smith
Ellis, Lulu F.

Egan Ranch, Inc.
Egan, Minnie R.
Elsen, Monica Van
Freestad, Gus
Freestad, Helena
Isaacs, Flora
Kolka, Arthur
Kolka Cattle Company
Love, Doris Lukes Estate
L. J. Green & Sons, Inc.
Muggli, Hugo
Muggli, Cecilia
McLean, Bruce
Newcomer, Ola Lue
Rice, Signa Woods
Ravenscroft, Francis J.
Ravenscroft, Martha
Ravenscroft Cattle Co.
Swope, Jack A.
Swope, Wanda J.
Schiller, Herbert Allen
Schiller, Vera Jean
Shy, Mae R.
Shy, George Porter
Shy, Eva Rose
Smith, Ray
Terrett, Julian, Jr., Trustee
Terrett Ranch Inc.
The Failings, Inc.
Todoroff, John
Wiltse Cattle Company
Woods, Elvy M.
Whitbeck, George W., as to the interest of Gladys Sad
Wood, Merle E.
Wood, Francis M.
Wegner, Elsie A.
Yager, Joseph J.
Zook, Thomas F.
Zook, Isabel
Barkemeyer, Ralph, also known as Ralph W. Barkemeyer
Crosby, Ethel, Trustee, individually and as successor of the estate of C. A. Lewis, Jr., deceased
Crosby, Rodney, Trustee, individually and as successor of the estate of C. A. Lewis, Jr., deceased
Crosby, Rodney W.
Crosby, Rodney, Sr.
Crosby, Ethel
Crosby, Ethel Lewis
Crosby, Rodney L.
Faddis-Kennedy Cattle Company
Gibson, William K.
Gibson, Lowell C.
Hibbs, R. P.
Hunt, N. B.
Kennedy, J. R. Porter
Kennedy, Robert S.
Manning, Dave, whose name erroneously appears as Manning, Bradbrook and Manning, Verhelst, successor to Big Horn Project, Inc., a dissolved corporation, and

Big Horn Tullock District Company, a dissolved corporation, which is erroneously named Bighorn Tullock Project, as to which corporations defendant Ed Verhelst, now deceased, was also a successor

Mill Iron Cattle Co.
Roods, Darlyne L.
Roods, Eva May
Roods, Louis R.
Roods, Mildred J.
Roods, Robert
Roods, Susan R.
Willcutt, William J.
Koss, Adam
Koss, Lee
Koss, Virginia L.
First Continental Corporation
Kingsbury Ditch Co.
Glacier Park, Inc.
Cloverdale Ranch, Inc.
Aasheim, Velma
Aggen, Arvid & Linda L.
Anderson, Oliver & Florence
Ator, Harvey & Mary K.
Bergh, Beatrice & Quentin
Brookman, Marvin H.
Bucklin, Frank W., Jr. & Catherine Murray
Bolster, Lloyd
Bowers, L. & Ruth J.
Boysun, Steven
Barsness, Richard K. & Susan
Brown, Marjorie L.
Berry's Land & Livestock
Collins, Kenneth D.
Carroll, Ferestad, Inc.
Chabot, Dale E. & Elaine L.
Chabot, Amedee & Margaret
Camrud, Iver
Danelson, Julian C.
Darvis, Gerald A.
Darland, Tom
Eggen, Eugene
Fouhy, Anna Belle
Fouhy, Francis George
Fouhy, Edith Pearl
French, Robert D.
Freske, Robert
French, Glenn L. & Harvey E.
Friedrich, Donald A.
Frederick, Hattie
Hatfield, Eugene & Ruth
Herman, Harry M.
Hjort, Alice
Hedges Corporation
Harriet, Alfred C.
Hanson, Vernon
Hancock, Vern T.
Holji, Shirley D. Harris
Holen, Kenneth
Hoversland, Andreas
Hoversland, John B.
Handran, James W.
Holen, Lloyd & Doris M.
Jacobson, John
Johnson, Lester G.
Johnson, Melvin O.
Johnson, Rudolph L.
Johnson, James H. & Bernice
Johnson, Gerhard Y. & Helen B.
Johnson, Roger W. & Margaret

Johnson, Archie
J Bar E Ranch
Johnson, Keith E. & Linda M.
Kisler, James G. & Cherie
Larsen Farms, Inc.
Lodahl, Niels A., P.R. for Frank Bast & Lillian Jorgensen Bast, Decd.
Lund, Anna Jansen
Lee Ranch, Inc.
Lee, Ernst M.
Lund, Hereford Ranch
Lee, Aldon E. & Rita R.
Lund, Robert L.
Lien, Orphy A. & Birdell C.
Medders, Elsie A.
Murray, Dale & Catherine
Medders, Lila
Munz, Glen & Alberta E.
Martin, Eugene J., Loretta C. & Allen A.
McCann Ranch, Inc.
Middagh, Robert W. & Willie Lou
Marottek, Frank & Mertice M.
Nash Brothers
Nelson Angus Farms
Nelson, C. W. & Sons
Overby Agribusiness, Inc.
O'Conner, Richard K.
O'Conner, Leo & Jean M.
Pittenger, Annette
Petersen, Sigrid O.
Pratt, Kenneth W.
Pratt, Willie O.
Paulson, Gene & Frieda C., P. R. for Gilbert Paulson, Decd.
Pickthorn, Lyle & Anna E.
Reed's Border Polled Hereford Stock Farm, Inc.
Romo, Lester V. & Catherine S.
Reinhart, James L. & Reita D.
Richardson, Robert & Dorothy
Sorenson, Michael & Steven
Sundsted, Helga Doris
Shipstead, Milton
Tade, Inc.
Twedt, Henry
Twedt, Knute
Tange, John K.
Thompson, Gordon C.
Thomsen, Elsine
Tollefson, David & Bernice W.
Traeger, James Robert
Voxland, Tommy R. & Luella M.
Wilcoxen, Alice
Wilcoxen, James
Wang, Ole E.
Warmbrod, John, Myrtle & Lela
Wall, David A. & Agnes
Wolf Point, City of
Zimmer, John, Jr.
Zimmer, Thomas & Delores

Petitioners represented by BERT W. KRONMILLER and JAMES E. SEYKORA

Mr. Ivan Abel
Mr. & Mrs. Carlyle Arndt
Mr. Charles W. Avery
Mr. & Mrs. Donald Bell
Mr. & Mrs. Harold Benzel
Mr. A. G. Bird
Mr. & Mrs. Earl Bauman
Mr. & Mrs. Arden F. Blair
LaVerne Bomar
Mr. & Mrs. Chester Bounous
Bozeman Trail Ditch Company
Campbell Farming Corporation
Mr. Lloyd Carper
Chimney Creek Ranch
Mr. Jack Colstad
Mrs. Helen Cummings
Mr. & Mrs. Robert Dewald
Mr. Jay Dooley
Mr. & Mrs. Carl Dorn
Mr. & Mrs. George Dorn
Mr. & Mrs. Larry Dorn
Mrs. Gladys Downs
Mr. & Mrs. Otto Dringman
Mr. John Dudis
Mr. Albert Eckman
Mr. August Elhard
Mr. LeRoy Enzminger
Mr. Charles Finley
Mrs. Helen S. Fisher
Mr. George Fly
Mr. & Mrs. Harvey Fox
Mr. John Gentry
Mr. & Mrs. Robert Greenwalt
Grocers Realty Corporation
Mr. & Mrs. Robert Harlin
Mr. Gill Harris
Mr. & Mrs. Walter Havener
Mr. & Mrs. William Herbel
Mr. & Mrs. Albert Herman
Jenny Tuggle Hiber
Mr. Joe E. Hope
Mr. & Mrs. William Kern
Mr. & Mrs. John Kincaid
Mr. & Mrs. John Kukes
Mr. & Mrs. Robert Kukes
Mrs. Grace D. Lammers
Mr. & Mrs. Jack Laughery
Mr. Arthur Lee Laughery
Mrs. Margaret Seaton Libby
Mr. Fred Lind
Mrs. Regina Lind
Mr. & Mrs. John Lind
Mr. & Mrs. Gustav Maack
Mallard Land Corporation
Mr. Speros Manolis
Mr. & Mrs. Vernard Melville
Mr. & Mrs. Ray Morissette
Mr. Casey Munter
Mr. Leonard Munter
Nayematsu Brothers, Inc.
Mr. Chester A. Nayes, Jr.
Mr. C. A. Nayes and Mildred E. Nayes
Mrs. Laura Nepper
Mr. Donald Orchowski
Mr. Juell Ottun, Inc.
Mr. Walter Patterson
Mr. & Mrs. Pete Pattyn
Mr. Elmer Paulson
Mr. & Mrs. Vernon Pegram

Mr. & Mrs. Coil Redding
Mr. & Mrs. Lawrence Rider
Mr. & Mrs. Fred Schmidt
Mr. & Mrs. Fred Schneider
Mr. & Mrs. Johnny Schneider
Mr. & Mrs. Adam Seader
Mr. & Mrs. Henry Seder, Jr.
Mr. Kenneth Seder
Shirasago Farming Corporation
Mr. & Mrs. Walter Sielensky
Mrs. Avis Slattery
Mr. Albert J. Steen
Mr. & Mrs. Fred Stricker
Mr. & Mrs. Charles E. Sweeney
Mr. Sterling Torske
Mr. & Mrs. Lawrence Tuggle
Two Leggins Water Users Association
Mr. & Mrs. Cecil Tysver
Mr. & Mrs. Henry Uffelman
Mr. & Mrs. Charlie Vandersloot
Mr. & Mrs. Lambert Vandersloot
Dr. D. L. Van Zandt
Mr. C. C. Wagenaar
Mrs. Laura Ann Ward
Mr. Floyd Warren, Inc.
Mr. David Watson
Mr. William C. Watson
Mrs. Florence M. Wells

Petitioners represented by DOUGLAS Y. FREEMAN

Anita Angus Ranch
Atkins, Bonita
Atkins, Douglas
Bailey, Connie
Bailey, Donald Patrick
Bainter, Marie
Ball, Calvin J.
Barber, Catheryn
Barber, John W.
Barnes, Gary
Barnes, Marie
Bastrom, Floyd
Bastrom, Linda
Bastrom, Marie
Beck, Clarence
Beck, Theresa
Benzel, John
Benzel, Ruth L.
B. E. Ranching Company
Besel, John
Besel, Mary
Big Horn Low Line Canal
Big Horn Tullock Project
Blair, Mary Lou
Blair, William J.
Boehs, Barbara
Boehs, Richard
Bowman, John A.
Bowman, Martha A.
Boyce, Inc.
Boyce, Dee
Brown, Harriet C.
Brown, Murry J.
Brown, Murry
Brown, Murry J., Jr.
Brown, Murry, Jr.
Murry Brown Ditch
Brown, Ralph E.
Butler, Chester

Butler, Frank R.
Butler, June H.
Butler, Minnie
Cady, Bruce M.
Cady, Dorothy V.
Calvetti, Andrew A.
Calvetti, Gladys
Carlis, George
Carlton, Pete W.
Carlton, Sheila M.
Chauvin, Christine
Chauvin, Joe H.
Chavez, Evelyn Ann
Chavez, Frederick
Clawson, Dorothy
Clawson, John O.
Coleman, Lee L.
Conner, Clara A.
Connor, Jack B.
Cool, Ruth
Cooper, Dema L.
Cox, Audie May
Crawford, Doris Ann
Crawford, Madge
Crawford, William R.
Crilly, Anna G.
Criswell, Leslie
Criswell, Lucia
Criswell Ranch Company
Croghan, R. D. Development
Crum, George B.
Curry, Fern
Curry, W. A. (now deceased)
Dabney Angus Ranch Co., Inc.
Dabney, Gene
Dabney, Jean
Deines, Harry
Deines, Helen
Delp, Jack D.
Delp, Donna T.
Deneen, Helen
Deneen, Morgan
Denny, Gertrude D.
Denny, Sam E.
Devoure, Frances J.
Devore, Gordon L.
Dinsdale, Alfred E.
Dobkins, James L.
Dobkins, Sharon M.
Donnes, Adeline
Donnes, Frank
Door Key Ranch
Dudis, Dorothy
Dudis, John
Durden, Pat (Biggs)
Dygert, Clyde J.
Dygert, Leone
Dygert, Leone C.
Eagle Land Company
Easton, Elmer W.
Easton, Minnie B.
Eckroy, Goldie M. (now deceased)
Eckroy, Goldie Mary (now deceased)
Eggart, Helen
Eggert, Helen
Eggert Pump Ditch
Egnew, Charles
Egnew, D. L.
Ellis, Ervin D.
Ellis, Ethel
Ellis, Gerald H.
Eshleman, Emerson
Eshleman, Mary
Eshleman, Robert H.
Esp, Donna
Esp, Henry L.
Farly, Boyd

Farleys, Inc.
Faught, James
Faught, James J.
Faught, Myrtle
Fellows, Charles E.
Fellows, Heather W.
Fellows, Mary
Fellows, Walter
Fellows, Walter M.
Fisher, Agnes
Fisher, Roger Courtland
Fitzgerald, Genevieve N.
Fitzgerald, Jay
Fly, George R.
Fly, Roy
Foote, M. Gordon
Fox, Alex
Fox, Betty J.
Fox, Donald D.
Fox, Larry K.
Fox, Luella J.
Fox, Martha
Fuller, Lawrence S., Jr.
Fuller Ranch Company
Garney, Adell
Gentry, James E.
Gibson, Helen F.
Gibson, John B.
Giesy, Orlin C.
Graham, Carroll A.
Graham, NellyVette
Greenwalt, Roy
Gregory, Frank (deceased)
Gregory, John R.
Gregory, Mary R.
Gregory, Richard Alan
Gregory, Ruth
Grinsteiner, Betty L.
Grinsteiner, John M.
Gross, Erle
Hamilton, Gladys M.
Hamilton, Herman L.
Hamilton, J. S.
Hamilton Ranch
Hammond, Arlene E. L.
Hammond, Bert
Hammond, Lester
Hardin Meat Market
Hardy, Warren
Harmon, Anita M.
Harmon, Leo W.
Hartung, Katherine
Hartung, Robert
Hawker, Virginia Vesely
Hawks, Clyde, Inc.
Hawks, Clyde L.
Hawks, Dolly O.
Haynie, Patrick
Heitzman, Arlene M.
Heitzman, Larry G.
Heitzman, Walter
Henman Ditch
Herbel, Eve
Herbel, William
Hibnes, Barbara Marie
Hibnes, William Virgil
Holland, A. E.
Holland, Cecil Y.
Holland, Mildred
Hope, Alice
Hope, Carl B.
Hope, Rich
Hope, Walter
Hults, Irwin G.
Hults, Ralph M.
Hussey, Wylma (Flack)
Imer, Betty J.
Imer, Richard L.
Jabs, Mary
Jabs, Monte L.

Jabs, Reinhold J.
James, Mart V.
James, Shirley C.
Jeffers, Hale
Jeffers, Judith
Jeffers, Justine E.
Jeffers, Terry E.
Jeffers, W. Scott
Jeffers, Winfield
Jeffers, Winfield W.
Jeppesen, Helen L.
John, Kenneth F.
John, Madge Lucille
John, Madge R.
Johnson, Torrey
Kaiser, Anna Mehling
Kaiser, Arthur L.
Kaiser, Cecilia B.
Kaiser, Verne N.
Kan Sun Cattle Feeders, Inc.
Keeler, Clarence J.
Keeler, Selina N.
Kehler, Esther
Kehler, Mary E.
Kehler, Richard
Kehler, Richard, Sr.
Kehler, Richard L., Jr.
Keller, Benny
Keller, Eileen
Kelley, Edmund
Kelley, Ruth
Kemph, Erna R.
Kemph, Joe O. (actually Joe Q)
Kemph, Lawrence T. Jr.
Kenney, Stephen
Kenney, Stephen J.
Kenney, Steve
Kern, Mary J.
Kern, Harriet Dana
Kern, Robert Wayne
Kern, Wilbur W.
Kerns, Kenneth
Kerns, Kenneth D.
Kerns, Margaret
Kimmel, Jean
Klein, Kathleen
Kline, John
Kline, Madge
Koebbe Construction
Koebbe, Joe V.
Koebbe, Lawrence
Koyoma Farms, Inc.
Kreitzberg, Dean E.
Kreitzberg, Venita
Kronmiller, L. H.
Kukes, Jean Ann
Kukes, Robert L.
Kurtz, Ray E.
Lackman Farming Corporation
Lamar Ranching, a corporation
Lind, Fracine
Lind, Gregory D.
Lobo Cattle Co.
Luther, Delores E.
Luther, George F.
Lurther, John
Luther, John, Jr.
Luther, Joseph R.
Luther, Nancy C.
Luther, Stella
Lynde, Eleanor
Lynde, Myron
Maack, Floyd
Maack, Lillian
Maack, Tony
MacClean, Ed

MacClean, Ed
MacClean Ranch
Marshein, Robert L. (a/k/a Robert L. Margheim)
Marshein, Shirley R. (a/k/a Shirley R. Margheim)
Martinsen, Mary
Martinsen, Roy
May, Albert Estate
May, Charles
May, Virginia
McGovern, Francis M.
McGovern, John J.
Mehling, Bobby Lee
Mehling, Darlene
Mehling, Esther
Mehling, John
Mehling, John D.
Mehling, Marilyn
Miklovich, Helen (a/k/a Helene Miklovich)
Miklovich, Pete
Miller, Barry
Miller, Edna Mae
Miller, Edwin
Miller, Edwin A.
Miller, George C.
Miller, Harry H.
Miller, Katie Y. Estate
Miller, Margaret Torske
Miller, Shirley Ann Humphrey
Miller, Walter, Jr.
Miller, William Earl
Miller, Vela Mary
Millers Ditch
Millers, Inc.
Morrison, Columbia J.
Morrison, Joseph E. (now dec'd)
Moyer, Ethelynne
Moyer, Howard
Nedens, Edward
Nedens, Nancy
Nelson, Ernest L.
Nelson, Kathleen K.
Newhold, Frank
Newman, Guilford
Nichols, Millard S.
Noblett, Irene
Noblett, John
Noyes, Chrystal
Obie, Donald L.
Obie, Janis L.
Obie, Richard G.
O'Brien, Ruth E.
Ohmstede, Daryl D.
Ohmstede, K. Ann
Olenik, Andrea M.
Olson, Olive S.
Osness, Erling
Osness, Rose
Ottun, Esther L.
Ottun, Geraldine (Anderson)
Ottun, Raymond St. Clair
Overturf, Clemince W.
Overturf, Marilyn R.
Overturf, Roger
Owens, Jack
P & L Cattle Co., a corp.
Pattyn, Cyriel
Pattyn, Letty
Pease, Virgie
Perrin, Dorothy
Peters, Joe
Peters, Pauline
Petersen, Burke
Petersen, Yvonne

Peterson, Burke
Pilkington, Donald D. (deceased)
Pilkington, Elizabeth H. G. (now Lindsay)
Ping, J. J. (deceased)
Pitsch, Arthur
Pitsch, Connie A.
Pitsch, David L.
Pitsch, Harvey Lee
Pitsch, Ida
Pitsch, Irvin
Pitsch, Lavone Marie
Pitsch, Mary Ann
Pitsch, Mary Elaine
Pitsch, Pete
Pitsch, Peter
Pitsch, Reuben
Pitsch, Reuben C.
Pitsch, Robert S.
Pitsch, Sarah
Price, David N.
Price, Joy
Pryor Land Company
Quigley, Bernie C.
R & C Building, a partnership
Rassmussen, J. Philip
Reddin, Carolee
Reddin, William, Jr.
Redding, Mabel
Redding, Vella B.
Rice, Edward S., Jr.
Rogerts, Inc.
Rokita, John J.
Rokita, Wauneita
Romine, Betty
Romine, James
Rotten Grass Cattle Co.
Rule, Robert C.
Rule, Venita P.
Russell, George C.
Russell, Lola K.
Salveson, Cathy Lee
Salveson Pump Ditch
Salveson, Robert A.
Slaveson, Ira Burdette
Slaveson, Iva Burdette
Schaak, Adolph Duane
Schaak, Daniel
Schanaman, Lee Roy
Schanaman, Pearl E.
Schissler, Jerry
Schissler, Joan
Schissler, Lenice
Schneider, Alex
Schultz, Dorothea
Schultz, Jake
Schwend Ranch
Seader, Fred
Seader, Ruth
Shick, Herman L.
Shick, Lucyle
Shick, Lyle
Sjostrom, Lars J.
Sjostrom, Sadie L. (now deceased)
Slter, Bert
Slater, Martha
Smith, Evelyn Young (Wilson)
Smith, Raymond M.
Snively, Alta
Snyder, Lloyd
Snyder, Lloyd V.
Spear, Bradford J.
Spomer, Elizabeth
Spomer, Pete
Standish, Marie
Stark, Earl A.

Stark, Vernice
Steinmetz, Mary P.
Stevens, John
Stevens, John T.
Stevens, Sheryl M. Pease
Stimpson, Harold E.
Stimpson, Norma M.
Strecker Farms, a corporation
Stovall, Elizabeth T.
Sullivan, Bernadette
Sullivan, Humphrey
Swaby, Frances Mack
Thrower, Georgia
Thrower, Rex R.
Torske, A. L.
Torske, Andrew L.
Torske, Bernice
Torske Cattle Company
Torske, Mary B.
Torske, Robert
Torske, Robert T.
Torske, Rose E. (now deceased)
Torske, Walter C.
Torske, Walter Lyle
Triangle Motor Company
Tyler, Jocelyn J.
Tyler, Lyle B.
Uffleman, Helen
Uffleman, William
Valdez, Beverly R.
Valdez, Priscilla
Valdez, Roy
Valdez, Roy, Jr.
Van Cleve, Mary
Wagenaar, Grace M.
Wagner, Edward
Wagner, Martha
Ward, George D.
Ward, Patricia J.
Weber Farms, Inc., a corporation
Weinberg, Joseph J.
Weinberg, Katheryn
Weibert, Reuben
Weibert, Ruth
Westwood Cattle Company
Westwood Ranch Company
Wham, Claude
Whaley, Edward
Whaley, Elizabeth
Wheeler, Vera E.
Wightman, Evelyn
Wightman, Howard
Willett, Viola R.
Williams, Ennice V.
Williams, John A.
Willson, Evelyn
Willson, Virgil
Wolfe, Ellen T.
Wolfe, Ellen Tredway
Wolfe, Margaret
Zettle, Kenneth (deceased)
Ziler, Lawrence R.
Bailey, Donald P.
Bailey, Connie
Bailey, James N.
Bailey, Mary E.
Bar 69 Cattle Company
Barnes, Dewey
Brooke, Vennie Lane
Boyce, Inc.
Carlat, Ralph
Coates, Fern
Coates, George O.
Coates, Leslie E.
Coates, Shirley C.
Faddis-Kennedy Cattle Co.
Farley's Inc.
Fowler, Ruth E. Estate

Goodwin, Addie M.
Goodwin, Horace F.
Goodwin, Margaret
Greenleaf Land & Livestock Co.
Gregory, Mary Roush
Hamilton, James S.
Hamilton, James S., Jr.
Hamilton, Lois J.
Hanks, Anne T., now known as Anne T. Black
Hawker, Virginia Vesely
Holmes, Raymond
Hults, Irwin G.
Hults, Ralph M.
Jones Bros. Livestock Co.
Jones, Hugh O.
Johnson, Adrienne
Johnson, S. Torrey
Kennedy, J. R. Porter
Kennedy, Robert S.
Korbe, Mary Dufford, now known as Mary Knott
Lockie Livestock Company
Luther, George
Luther, Nancy
Miller, Walter, Jr.
Millers, Inc.
Muller, Simon
Morris, Alice Mae, now known as Alice Mae Fleming
Morris, Willis D.
Muller, Simon
Muller, Winnifred
Pease, Ida
Peterson, Burke
Peterson, Yvonne
Pierce, Almeda
Pierce, Joseph M.
Pierce, Jim
Pitman, George
Powell Cattle Company
Rocker Six Cattle Company
Rockman, Lillian Yarlott
Schaar, Dan a/k/a Dan Schaak
Schaak, John
Sheeley, Glenn H.
Sheeley, Glenn H. & Co.
Sheeley, Mary C.
Sheeley, Mary C. & Co.
Spear O Ranch Company
Sprague, Harold
Sprague, Virginia
States, Vernon J.
Straw, Alva E.
Straw, Vennie Lane
Swift, Robert E.
Swift, William B.
Watson, Hugh Lloyd
Watson, Lloyd Ronald
Westwood Cattle Company
Westwood Ranch Company
Westwood, Jack R.
Young, John

APPENDIX B

Lists of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates for petitioner corporations, pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States.

CONSOLIDATION COAL COMPANY

E. I. duPont de Nemours and Company is the parent of Conoco, Inc. which is the parent of Petitioner Consolidation Coal Company. Affiliated domestic companies other than wholly owned subsidiaries are:

Sit-Con Oil Corporation
Colonial Pipeline Company
Pioneer Pipe Line Company
Platte Pipe Line Company
Seaway Pipeline, Inc.
Syngas Company
Mathies Coal Company
Bishop Coal Company
Itmann Coal Company
Pelix Oil Company
Long Beach Oil Development Company
Yellowstone Pipe Line Company
Dixie Pipeline Company
Petroleum Terminals Incorporated
West Shore Pipe Line Company
Southern Facilities, Inc.
Lake Charles Pipe Line Company
Explorer Pipeline Company
Seadock, Inc.
Texas Offshore Port, Inc.
Oil Shippers Service, Inc.
Calcasieu Chemical Corporation

GULF OIL CORPORATION

A/S Jargul
A/S Jargul & Co. K/S
Albert Rose Chemicals, Ltd.
Allied-General Nuclear Services
Asia Polymer Corp.
China Gulf Oil Company Limited
China Gulf Plastics Corporation

Colonial Pipeline Company
Compagnie D-Investissement Bustibles De Reacteurs A Haute Tp
Delaware Bay Transportation Company
Dixie Pipeline Company
Ethyleen Pijpleiding Maatschappij (Belgium) S.A.
Ethyleeo Pijpleiding Maatschappij (Nederland) B.V.
Explorer Pipeline Company
General Atomic Company
Gulf Canada Limited
Gulf Oil Zaire S.A.R.L.
Harshaw Galvanoteenia
Harshaw Quimica Ltda.
Hochtemperature Reaktorbau GMBH
Industrias Vencedor S.A.
Insco Holding & Finance Company N.V.
Interquimica S.A.
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Laurel Pipeline Company
London Oil Refining Company Limited
Mid-Valley Pipeline Company
Midwest Carbide Corporation
North River Energy Company
Oil Shippers Service, Inc.
Oklahoma Nitrogen Company
Paloma Pipe Line Company
Pembroke Capital Company
Pembroke Cracking Company
Plastigama, S.A.
Platte Pipeline Company
Pol Transport AB
Raffinerie De Cressier S.A.
Rio Blanco Oil Shale Partnership
Sarni S.P.A.—Refining
Societe de Combustible Pour Reacteurs A Haute Temperature (Corhat)
Solvent Refined Coal International, Inc.
Sunrise International Company Limited
Taita Chemical Corporation
Venezuela Gulf Refining Co.
West Texas Gulf Pipe Line Co.

MONTANA POWER COMPANY

Western Energy Company
Northwestern Resources Co. (Subsidiary of Western Energy Company)
Altana Exploration Company
Intercontinental Energy Corporation (Subsidiary of Altana Exploration Company)
Sunlight Development Company

Glacier Gas Company
North American Resources Company
Colstrip Community Services Company
Canadian-Montana Gas Company, Limited
Roan Resources, Limited (Subsidiary of Canadian-Montana Gas Company)
Canadian-Montana Pipeline Company
Montana Power International Finance, N.V.

PEABODY COAL COMPANY

The parent company of the Peabody Coal Company is Peabody Holding Company.

SHELL OIL CO.

Shell Petroleum N.V., a Netherlands corporation

Royal Dutch Petroleum Co., Hague, Netherlands

The "Shell" Transport & Trading Co., Ltd. of London, England

Butte Pipeline Company

APPENDIX C

The NORTHERN CHEYENNE TRIBE OF the NORTHERN CHEYENNE INDIAN RESERVATION, et al., Plaintiffs-Appellants,

v.

Thomas Ralph ADSIT, et al.,
Defendants-Appellees.

Nos. 79-4887, 80-3028, 80-3032, 80-3038, 80-3040 to 80-3042, 80-3044, 80-3045 and 80-3061 to 80-3063.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 15, 1981.

Decided Feb. 22, 1982.

Appeal from the United States District Court for the District of Montana.

Before MERRILL, CHOY and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

The United States government and various Montana Indian tribes appeal the dismissal of consolidated actions brought to adjudicate federal and Indian water rights in Montana. The federal court actions were dismissed in favor of state court proceedings. Dismissal was predicated on the Supreme Court's decision in *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (hereinafter "*Akin*"). Because *Akin* was erroneously applied to the facts of the Montana litigation, we reverse.

I. PROCEDURAL HISTORY.

In January, 1975, the Northern Cheyenne Tribe brought suit in United States District Court for the District of Montana to adjudicate water rights in the Tongue River and Rosebud Creek in Montana. Jurisdiction was alleged under 28 U. S. C. § 1362.[1] In March, 1975, the United States brought suit pursuant to 28 U. S. C. § 1345[2] for the same purpose, in its own right and as fiduciary on behalf of the Northern Cheyenne and other reservation tribes. In July, 1975, the Montana Department of Natural Resources and Conservation ("DNR") filed petitions in state court for a determination of all existing rights to those waters in accordance with existing state law.

In August, 1975, the United States brought suit in the district court on behalf of the Crow Tribe. Judge Battin consolidated the cases and stayed proceedings in February, 1976, pending the Supreme Court's decision in *Akin*. The State of Montana, a defendant in those cases, moved to dismiss as a result of that decision. At the same time, the Crow Tribe moved to intervene. Both motions were argued in the summer of 1976.

In February, 1979, the federal government and the tribes moved for expedited consideration. In April, 1979,

---

1. 28 U. S. C. § 1362 provides:

> The district courts shall have original jurisdiction of all civil actions brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

2. 28 U. S. C. § 1345 provides:

> [T]he district courts shall have original jurisdiction of all civil actions or proceedings commenced by the United States, or by any agency or officer thereof . . .

the United States filed more actions in the district court seeking a declaration of water rights on behalf of the United States and four additional tribes.

On May 11, 1979, an amended state water consolidation plan, Montana Senate Bill 76, took effect. The Montana Supreme Court ordered implementation and authorized the DNR to notify relevant parties in June, 1979.

In July, 1979, Judge Hatfield stayed the federal actions initiated in 1979. In November of that year, Judges Battin and Hatfield issued a joint opinion dismissing all federal actions as an exercise of "wise judicial administration" as outlined in *Akin. Northern Cheyenne Tribe v. Tongue River Water Users,* 484 F. Supp. 31 (D. C. Mont. 1979).

The United States and the Indian tribes appeal that dismissal, arguing that it is predicated on an erroneous application of *Akin.* They maintain that because the Montana constitution and enabling act contain disclaimers of jurisdiction over Indian tribes, the litigation in that state differs from the Colorado litigation which was the subject of *Akin.* Further, they argue that the specific factors underlying the *Akin* decision are not present in the Montana litigation and that the contrast requires retention of federal jurisdiction.

II. THE DISCLAIMER ISSUE.

A. *Jurisdiction over Indian Water Rights.*

Traditionally, Indian water rights have been reserved in trust to the federal government. *Winters v. United States,* 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908); *Arizona v. California,* 373 U. S. 546, 83 S. Ct. 1468, 10

L. Ed. 2d 542 (1963), *overruled on other grounds*, 438 U. S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1977). Federal courts have consistently exercised jurisdiction over Indians on reservations, *Minnesota v. United States*, 305 U. S. 382, 59 S. Ct. 292, 83 L. Ed. 235 (1939), unless jurisdiction is explicitly granted to the states by congressional statute. *Fisher v. District Court of Montana*, 424 U. S. 382, 388, 96 S. Ct. 943, 947, 47 L. Ed. 2d 106 (1976). Congress has granted state courts jurisdiction over Indian rights with respect to various criminal and civil matters, but in each grant, jurisdiction over Indian water rights has been specifically excluded. 28 U. S. C. § 1360(b); 18 U. S. C. § 1162(b); 25 U. S. C. § 1322.[3]

In 1952, Congress passed the McCarran Amendment, 43 U. S. C. § 666, granting state courts jurisdiction over the United States when litigation involves comprehensive adjudication of water rights and the United States is a necessary party.

---

3. Each statutory section states:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States . . .

(emphasis supplied).

Sections 25 U. S. C. 1322 (b) (alienation, encumbrance, taxation, use, and probate of property) and § 1360 (b) (state civil jurisdiction in actions to which Indians are parties) further provide that nothing in these sections

> shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. . . .

43 U.S.C. § 666(a). The Act does not mention Indians or reservations. It is limited to waiving of the sovereign immunity of the federal government with respect to water rights acquired " by . . . appropriation . . . or otherwise." In no way does the McCarran Act repeal any of the jurisdiction of the federal courts. The Act merely extends the United States' consent to suit in certain cases.

In 1976, the Supreme Court interpreted the McCarran Amendment as a grant of jurisdiction over water rights of Indian tribes when the right is asserted by the federal government as fiduciary. *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed. 2d 483 (1976) (*Akin*). When the United States is a party to a proceeding involving these rights, the Court held that the ability of the state to assert jurisdiction over the federal government implicitly allows jurisdiction over the rights of tribes that, without the McCarran Act, would have been immunized by federal statutes against suits in state court.

In a crucial footnote, the Court noted the restrictions on jurisdiction over Indian water rights provided in 25 U.S.C. § 1322(b) and 28 U.S.C. § 1360(b).[4] *Id.* at 812,

---

4. See footnote 3, *supra*.

n. 20, 96 S. Ct. at 1244, n. 20. The Court, however, held that limiting language in those sections only qualifies the import of the general consent to state jurisdiction given by those sections; the language does not purport to limit the special consent to jurisdiction given by the McCarran Amendment. *Id.* Accordingly, the Court dismissed the federal proceeding in favor of the comprehensive ongoing state proceeding.

B. *Montana's Disclaimers and Public Law 83-280.*

The Montana litigation raises a question not at issue in *Akin*. In a state which, unlike Colorado, expressly disclaims jurisdiction over Indian lands within its constitution and enabling act, does the McCarran Act grant jurisdiction and thereby repeal the state disclaimers? We hold that it does not.

Montana was admitted to statehood in 1889 on condition that it disclaim right and title to jurisdiction over Indian lands. Montana's enabling act provides that the state "disclaim[s] all right and title to the unappropriated public lands . . . owned or held by any Indian or Indian tribes . . ." 25 Stat. 676 (1889). The disclaimer of title in the enabling act is reinforced by the disclaimer of jurisdiction in the Montana Constitution that specifically provides, "all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the United States. . . ." Art. I, Mont. Const. 1972.

Only a year after the passage of the McCarran Act, Congress passed Public Law 83-280 establishing a procedure whereby states could repeal disclaimers in their constitutions and enabling acts. Public Law 280, "the

first jurisdictional statute of general applicability to Indian reservation lands," *Washington v. Yakima Indian Nation*, 439 U.S. 463, 471, 99 S.Ct. 740, 746, 58 L.Ed. 2d 740 (1979), dealt with "the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca County*, 426 U.S. 373, 379, 96 S.Ct. 2102, 2106, 48 L.Ed. 2d 710 (1953). Section 7 of that Act provides for automatic transfer of jurisdiction to the states by legislation. Section 6 deals with states which disclaim jurisdiction over Indians.

> Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

25 U.S.C. § 1324.

The Supreme Court held that the 1953 legislation allows assumption of jurisdiction in disclaimer states by legislative action. *Yakima, supra*, 439 U.S. at 484, 99 S.Ct. at 753. Federal law does not prescribe "the manner in which the States are to modify their organic legislation." *Id.* Accordingly, in those states which so provide, legislative action alone suffices to repeal the constitutional disclaimer of jurisdiction over Indians. *Id.* Furthermore, in enacting § 6, Congress meant to remove

any federal impediments to state jurisdiction that may have been created by an enabling act. *Id.* at 488, 99 S. Ct. at 755. Hence, the determination of whether legislative action is sufficient to repeal a disclaimer depends on whether such action is sufficient under the law of the acting state to amend its constitution. *Id.* at 493, 99 S. Ct. at 757.

Public Law 280 was amended in 1968 to provide "that States that have not extended criminal or civil jurisdiction to Indian country can make future extensions only with the consent of the tribes affected." 25 U. S. C. §§ 1321(a), 1322(a). *See Yakima, supra,* at 494, n. 40, 99 S. Ct. at 758, n. 40. Hence, after 1968, a state may repeal a disclaimer of jurisdiction over reservation Indians only with the consent of the affected tribes. In addition, the scope of consent is limited to the same jurisdiction provided automatic transfer states, *i.e.*, § 7 states. 25 U. S. C. § 1322.

C. *Analytic Framework.*

The McCarran Act overrides sovereign immunity of the United States in comprehensive water rights adjudications and the immunity of an Indian tribe represented by the government in such a proceeding. It cannot be read to amend a state constitution disclaiming subject matter jurisdiction over such matters.

A valid exercise of state jurisdiction requires that the state have both personal and subject matter jurisdiction. Via the McCarran Act, the United States has waived sovereign immunity from suit in certain cases involving water rights. In *Akin*, this waiver of sovereign immunity

operated to give Colorado personal jurisdiction over the United States and implicitly allowed jurisdiction over the rights of otherwise immune Indian tribes in circumstances where the state had subject matter jurisdiction. However, when a state has chosen to disclaim subject matter jurisdiction over Indian water rights, the combination of jurisdictional prerequisites necessary for a state court to hear a challenge to Indian water rights would appear to be lacking.

The appearance that subject matter jurisdiction is lacking in a state court in a disclaimer state would only be defeated by a finding that the disclaimer had been validly repealed. In order to make such a finding, a court must first determine whether the Montana water consolidation plan acts as a legislative repeal of the constitutional disclaimer of jurisdiction. *Washington v. Yakima, supra.* Second, it must determine whether such repeal required tribal consent as provided in the 1968 amendment to Public Law 280. Only if the Montana water legislation is determined to constitute a legislative repeal within the requirements of the federal law will the McCarran Act's grant of personal jurisdiction over the United States, acting as trustee for Indian water rights, furnish the state court with the requisite personal and subject matter jurisdiction. Only if a legislative repeal is found and the state has subject matter jurisdiction, need one consult the waiver of immunity provisions of the McCarran Act and consequently the terms of *Akin.*

The district court made no such analysis. Instead, it determined that the disclaimer/non-disclaimer distinction was inconsequential to Congress in passing the McCarran Act. This conclusion cannot be accepted when

viewed in light of the specific attention paid to the disclaimer/non-disclaimer distinction in P. L. 280 by Congress only a year after it passed the McCarran Act.

The district court's decision would rub the disclaimer/non-disclaimer distinction made by Congress of all significance and meaning, and would deprive the 1968 Amendment to P. L. 280, which requires tribal consent to a repeal of the disclaimer, of any effect. Accordingly, the district court's basis for decision was erroneous.

In so holding, we decline to follow the Tenth Circuit's decision in *Jicarilla Apache Tribe v. United States*, 601 F. 2d 1116 (10th Cir.), *cert. denied*, 444 U. S. 995, 100 S. Ct. 530, 62 L. Ed. 2d 426 (1979). *Jicarilla*, in considering the precise issue raised here, refused to recognize the distinction between states with constitutional disclaimers and those without. For the reasons noted above, we believe that recognition of this distinction is crucial deciding the jurisdiction issue.

Except for *Jicarilla*, with which we expressly disagree, no case brought to our attention permits a disclaimer state to adjudicate a challenge directed against Indian water rights. Construing the Montana enabling act, *Draper v. United States*, 164 U. S. 240, 247, 17 S. Ct. 107, 109, 41 L. Ed. 419 (1896), merely held that the disclaimer in Montana's enabling act did not deprive that state of power to punish for crimes committed on a reservation or Indian lands by non-Indians.

Williams v. Lee, 358 U. S. 217, 218, 223, 79 S. Ct. 269, 269, 273, 3 L. Ed. 2d 251 (1958), held that the State of Arizona, which expressly disclaimed jurisdiction over In-

dian lands, did not have jurisdiction over an action brought by a non-Indian in state court to collect a debt against an Indian and his wife. At issue in *Williams* was whether the case should be heard in tribal or state court. In holding that the case must be heard in tribal court, *Williams* explained that state jurisdiction would interfere with essential tribal relations. In the present case, the choice is between federal court and state court, not between state and tribal court; although essential tribal relations may not be involved, essential Indian rights to water, basic to the survival of tribes, are certainly at stake. An observation in *Williams* is relevant to this case. "Through conquest and treaties [Indian tribes] were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land." *Id.* at 218, 79 S. Ct. at 269. Were the State to expressly disclaim jurisdiction and the federal courts to give up their protective jurisdiction over Indian lands, including water rights, the Indians would seem deprived of the benefit of the original bargain that they were driven to make. Of course, by general statute, Congress later expressed its willingness to have any state assume jurisdiction over reservation Indians if the state legislature or the people voted affirmatively to accept such responsibility. *Id.* at 222, 79 S. Ct. at 271. To date, Montana does not appear to have accepted such responsibility.

In passing, we note that *McClanahan v. Arizona State Tax Comm'n.*, 411 U. S. 164, 179, 180, 93 S. Ct. 1257, 1266, 36 L. Ed. 2d 129 (1972) (holding that Arizona could not impose an income tax on reservation Indians), has expressly limited the application of the *Williams* tribal self-government test to certain circumstances:

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. [citations omitted]. In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.
>
> The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed.

Similarly, in the present case, we do not believe that the enabling act, the Montana constitution, P. L. 280, and its 1968 amendment can be overlooked simply because tribal self-government has not been infringed. Unlike *Williams*, but like *McClanahan*, the present case is not one that presents as a central issue, a choice between tribal and state jurisdiction; therefore, the *Williams* test has no application whatsoever to the present situation.

Kake Village v. Egan, 369 U. S. 60, 75, 82 S. Ct. 562, 570, 7 L. Ed. 2d 573 (1962), held that a disclaimer state could regulate the fishing of off-reservation Indians by enforcing against non-reservation Indians a state statute forbidding the use of salmon traps. Referring to *Kake*, *White Mountain Apache Tribe v. Arizona*, 649 F. 2d 1274, 1280 (9th Cir. 1981), which held that a disclaimer state is not precluded from imposing fishing and hunting license fees on non-Indians on a reservation, noted that the en-

abling acts do not force states to disclaim governmental or regulatory authority over Indian lands. We believe that *Jicarilla*, supra, went too far by relying on the distinction between proprietary and governmental functions drawn in *Kake* and *White Mountain Apache Tribe*. All that the latter two cases recognize is that a state may have a strong governmental interest that empowers it to regulate certain limited conduct concerning non-reservation Indians or non-Indians on reservations. Neither *Kake* nor *White Mountain Apache Tribe* permits a state court to decide how much water reservation Indians may take for use on their reservations.

The present case is not about fishing traps or licenses. More is at stake here than the mere power of a state legislature to regulate the use of fishing traps, where the power to regulate may have a secondary effect on Indian fishing rights; instead, the rights of Indians to the water itself is at issue. The power of a court in a disclaimer state to enforce a regulatory statute that may adversely affect Indians falls far short of the power to adjudicate a direct challenge to Indian water rights in and to the waters of streams. A disclaimer state cannot assert jurisdiction over such matters until Indian sovereign immunity has been waived and the state has repealed its disclaimer. Unless the state effectively repeals its disclaimer, it cannot hear this matter.

III. THE *AKIN* FACTORS.

Even if we were to find that Montana had validly repealed the disclaimer language in its constitution, we would nonetheless be compelled to reverse the decision below. The limited factual circumstances of *Akin* prevent

its application to the Montana litigation. Noting the virtually unflagging obligation of the federal courts to retain jurisdiction, the *Akin* Court held that principles of "wise judicial administration," *Akin, supra,* at 817, 96 S. Ct. at 1246, required dismissal given the "exceptional circumstances" of that case. *Id.* at 818, 96 S. Ct. at 1246. In the instant case, no exceptional circumstances mandate dismissal in the exercise of wise judicial administration.

The "exceptional circumstances" requiring dismissal in *Akin* included the following: Colorado had an extensive ongoing water plan in which the United States had participated. Colorado is not a disclaimer state. The federal government sued in federal court on behalf of several Indian tribes under 28 U. S. C. § 1345. During the pleading stage the federal court dismissed in favor of the ongoing state proceeding. The suit by the United States in federal court involved one small division of the state plan while the state proceeding was comprehensive. The Indians involved did not receive water rights by treaty. Nor did the Court find that the United States faced a conflict of interest in representing its various interests.

The Court noted in its decision (a) the apparent absence of any proceedings in the district court other than the filing of the complaint, (b) the extensive involvement of the state and state water rights, (c) the inconvenience of the federal forum's 300-mile distance from the location of the dispute and (d) the existing participation by the Government in the state proceeding. *Id.* at 820, 96 S. Ct. at 1247. Further, it noted that the federal forum must defer to the state where both have concurrent jurisdiction and the state action preceded the federal.

In limiting its holding, the Court stated: "[W]e do not overlook the heavy obligation to exercise jurisdiction. We need not decide . . . whether, despite the McCarran Amendment, dismissal would be warranted if more extensive proceedings had occurred, . . . if the involvement of state water rights were less extensive . . ., or if the state proceedings were in some respect inadequate to resolve the federal claims . . .," *id.* at 820, 96 S. Ct. at 1247, or if the suit were "brought by a private party," *id.* at n. 26. The Montana litigation is sufficiently different from that in *Akin* to require the district court to accept its "virtually unflagging obligation" to entertain jurisdiction.

Before considering the factors discussed in *Akin*, we note that under the heading "wise judicial administration," the district court included limited federal resources as a reason for leaving adjudication to the state courts. *Northern Cheyenne Tribe, supra*, at 36. It is a well established point, however, that conservation of federal judicial resources is not a proper reason for dismissing a case from the federal courts. An action properly filed in district court is not to be dismissed or referred to state court simply because the district court considers itself too busy to try the action. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 344, 96 S. Ct. 584, 589, 46 L. Ed. 2d 542 (1975). Shortages of judicial manpower are indeed unfortunate where they occur; however, it is not wise judicial administration for a federal court to shirk its responsibility to hear federal questions just because the court may not be able to dispatch the case as quickly as it may want to.

A. *Stage of the Proceedings.*

Akin involved a completed proceeding which had been in the adjudication process for years. Furthermore, the federal action in *Akin* involved only one section of the state; the United States was already a party in state proceedings in other water divisions. Finally, Akin did not involve allegations that the United States would be subject to conflicts of interests in representing its varied interests along with tribal interests.

In contrast, the Montana state court litigation has not passed the notice stage. The comprehensive plan envisioned by Montana was not enacted, until four years after the first federal suit was filed. Claims to all water rights under the plan will not be complete until 1982. In addition, though the federal litigation is no further along than the state litigation, the district courts stayed proceedings, apparently awaiting the state legislation.

B. *Comprehensiveness.*

Akin involved a truly comprehensive proceeding in state court with a concurrent piecemeal proceeding in federal court. Montana claims that a federal proceeding in the Montana case will be piecemeal because the federal courts have been unable to obtain jurisdiction over all defendants due to the in personam nature of the case. Further, Montana points out that the federal proceeding excludes the Missouri River and other important water bodies within the state. The federal action is limited to claims in which the United States owns a reserved water right. As to the actions that took place, the state claims that federal notice to affected parties was inadequate.

The Tribes counter that the state proceeding will be piecemeal because Indian allottees may not be joined. They also claim that the state proceeding is inadequate as it adjudicates only claims accruing after 1973 and excludes claims for livestock purposes. The state asserts that the exempted water rights involve a minimal amount of water. The district court does not explain the basis for its conclusion on the issue of comprehensiveness; nor did it make findings regarding the Tribe's claims.

The Tribes argue that even if all parties could be joined in the state proceeding, the federal court could adopt state joinder procedures and appoint special masters to implement the federal proceeding. They correctly stress that *Akin* only required dismissal where the federal proceeding would be piecemeal and the state proceeding is comprehensive. Where that is not the case and jurisdiction is concurrent, the federal court may not abdicate its judicial obligations.

C. *The Race to the Court.*

In *Akin*, state proceedings were ongoing when the federal action was filed. In Montana, the federal proceeding was the predecessor. This factor is not determinative, however, as both proceedings are in their infancy.

D. *Forum Non Conveniens.*

Akin relied on factors suggestive of a forum non conveniens analysis. Distance was a major consideration as the federal proceeding was 300 miles from the water district in question. The court relied on difficulty to the

parties in travelling to the location. That factor is not present in this case to encourage dismissal.

E. *Conflicts of Interest.*

In any state litigation, the United States must represent the water rights of all tribes as well as those of the Bureau of Land Management, the U. S. Forest Service, and other federal entities. The United States and the Tribes argue that conflicts among these interests would prevent the United States from representing them adequately. When the United States is faced with such a conflict, its representation of Indians is inadequate. *Manygoats v. Kleppe*, 558 F. 2d 556, 558 (9th Cir. 1972). Hence, the United States and the Tribes claim the Indians would be necessary parties over whom the state court has no jurisdiction.

The Tribes further argue that the result in *Akin* was limited to a situation in which the United States could effectively represent all of its diverse rights because of the limited scope of the proceeding. In contrast, the Montana litigation involves all water rights in the state. The McCarran Act is complied with only when the inclusion of the United States as a necessary party will provide complete adjudication of all issues. *Akin, supra*, at 819, 96 S. Ct. at 1247.

The state, relying on *Jicarilla*, argues that the Indians' right to intervene in court proceedings sufficiently protects their interests. However, we are reluctant to follow *Jicarilla* on this point for two reasons. First, it is unclear that the tribes have a right to intervene; if the state has disclaimed personal jurisdiction over the In-

dians, then they may not have that right. Whether the state disclaimer provisions reach so far is a question of state law that we need not and do not reach. Second, apart from any possible state disclaimer of personal jurisdiction, Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers; without express waived of sovereign immunity, an Indian tribe cannot be sued. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 1676-1677, 56 L. Ed. 2d 106 (1979). In the present case, the Indian tribe appears to be a necessary party to the state court proceeding, yet neither Congress nor the Tribe has consented to such a suit in state court. Under these circumstances, where the sovereign immunity of the Tribe has not been waived, and there is a conflict of interest between the Tribe and the United States, the Tribe could only protect its rights by intervening, at the expense of its basic right to sovereign immunity. We will not put the Tribe to this Hobson's choice.

Thus, the instant case is unlike the *Akin* case, in which the Tribe was not a necessary party and the United States, as trustee to the Indians' water rights, could apparently act as trustee without conflict of interest. Our examination of this conflicts factor leads us to conclude that it would not be wise or appropriate for the federal court to give up its traditional jurisdiction and defer to the state court in this case.

F. Jurisdiction under 28 U.S.C. § 1362.

The Montana litigation involves petitions by Indian tribes pursuant to 28 U.S.C. § 1362. That section, enacted

in 1966, authorizes suits by tribes in federal courts without the $10,000 amount in controversy requirement.

In *Akin*, the Supreme Court dismissed a suit brought by the federal government pursuant to 28 U. S. C. § 1345, authorizing the United States to sue in federal court. The Court declined to decide whether dismissal would have been appropriate had suit been brought by a private party. 424 U. S. at 820, n. 26, 96 S. Ct. at 1247, n. 26.

If this court were to further extend *Akin* in the Montana case to a suit brought by an Indian tribe, the result could prevent Indians from fully litigating their rights to water in federal court. Each time a tribe sued in federal court, the state need only join the United States as a party to obtain dismissal of the federal action. It is contrary to all reason to permit the states to frustrate federal jurisdiction merely by joining the United States as a party.

IV. CONCLUSION.

The Supreme Court has expressly and repeatedly noted the obligation of federal courts to retain jurisdiction in all but the most exceptional of circumstances.

The circumstances of the Montana litigation are sufficiently distinct f om the factors warranting exceptional treatment in *Akin*. The conflicts of interest present, the embryonic stage of state and federal proceedings, and the procedural status of the Montana case favor retention of federal jurisdiction. Accordingly, we reverse.

V. THE CROW TRIBE APPEAL.

The Crow Tribe moved to intervene in the district court. The district court refused to rule on the motion,

instead dismissing the action with the rest. To the extent that the court's action was a de facto denial of the motion, the tribe should be permitted to intervene in the interest of avoiding piecemeal litigation.

The judgment of the district court is REVERSED.

MERRILL, Circuit Judge, dissenting:

I dissent from the Court's holding that the disclaimer clauses in the Montana Statehood Act and in the State Constitution deprive the state courts of jurisdiction to establish and adjudicate reserved water rights of the United States held by it in trust for the Indians. On this issue I agree with *Jicarilla Apache Tribe v. United States*, 601 F. 2d 1116 (10th Cir.), *cert. denied*, 444 U. S. 995, 100 S. Ct. 530, 62 L. Ed. 2d 426 (1979).

The disclaimer clauses disclaim all right and title to Indian lands. But no one here lays any claim to Indian lands or water rights. The Statehood Act disclaimer provides that Indian lands "shall be and remain subject to the disposition of the United States, and * * * shall remain under the absolute jurisdiction and control of the Congress of the United States." 25 Stat. 676 (1889). But no one here disputes that Congress has always had jurisdiction and control over land owned by the United States and held by it in trust for Indians and that such lands always remained subject to disposition by Congress. Indeed, in enacting the McCarran Amendment, 43 U. S. C. § 666, Congress exercised its plenary control over Indian lands to authorize the states to adjudicate, as part of general stream adjudications, the federal reserved water rights of Indians. *See Colorado River Water Conservation District v. United States*, 424 U. S. 800, 96 S. Ct. 1236,

47 L. Ed. 2d 483 (1976) (*"Akin"*). The sole question then, as I see it, is whether the language "absolute jurisdiction and control of the Congress" is to be construed to mean exclusive jurisdiction of the federal courts in all suits involving Indian lands or property rights. In holding that that is not the meaning to be attributed to the language, *Jicarilla* followed *Organized Village of Kake v. Egan*, 369 U. S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962), where the Supreme Court held to that effect.

In that case, under the Alaska Statehood Act, the United States retained "absolute jurisdiction and control" over Indian property. The property in question was Indian fishing rights and the issue was the right of Alaska to regulate the Indian use of salmon traps. Speaking for the Court, Justice Frankfurter concluded from the Court's decisions in *Williams v. Lee*, 358 U. S. 217, 220, 79 S. Ct. 269, 270, 3 L. Ed. 2d 251 (1946), and *Draper v. United States*, 164 U. S. 240, 17 S. Ct. 107, 41 L. Ed. 419 (1896), that "'absolute' federal jurisdiction is not invariably exclusive jurisdiction." 369 U. S. at 68, 82 S. Ct. at 567. "[A]n examination of past . . . decisions makes clear," he wrote, "that the words 'absolute jurisdiction and control' are not intended to oust the State completely from regulation of Indian 'property (including fishing rights).'" *Id.* at 71, 82 S. Ct. at 568. He concluded, "These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." *Id.* at 75, 82 S. Ct. at 570.

To the same effect is this Court's recent decision in *White Mountain Apache Tribe v. Arizona*, 649 F. 2d 1274 (9th Cir. 1981). We there cited the *Organized Village of*

Kake and *Jicarilla* decisions for the proposition that the "Enabling Acts themselves forced states to disclaim only their proprietary interest in Indian land, not the states' governmental or regulatory authority over that land." 649 F. 2d at 1280.

If the disclaimers are no bar to state regulation of Indian property rights where those rights confront legitimate state interests, the McCarran Amendment, as discussed in *Akin*, makes it clear that state courts are vested with jurisdiction in the adjudication of Indian water rights.

McClanahan v. Arizona State Tax Commission, 411 U. S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973), is not to the contrary. There, in holding that Arizona was without jurisdiction to impose on reservation Indians a tax on income derived from reservation sources, the Supreme Court described the tribal interest at issue as "totally within the sphere which the relevant treaty and statute leave for the Federal Government and for the Indians themselves." *Id.* at 179-180, 93 S. Ct. at 1266. Here, in stark contrast, the McCarran Amendment actually authorizes the states to adjudicate as part of comprehensive stream adjudications the federal reserved water rights of Indians. "The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights. . . ." *Akin, supra*, 424 U. S. at 819, 96 S. Ct. at 1247.

Further I dissent from the Court's holding that wise judicial administration, as that term is used in *Akin*, does not call for dismissal of the federal suits. The district court dealt at length with the special circumstances presented by this case, taking note of Montana's detailed

water use legislation. *See* 484 F. Supp. at 35-36. Pursuant to that legislation, the Montana Supreme Court has filed an order requiring all persons claiming a water right within the state to file a statement of that claim with the State Department of Natural Resources and Conservation. These claims will be referred to water judges appointed in each of the state's four water divisions who shall enter a preliminary, and after an opportunity for hearing, a final comprehensive water decree.

The district court concluded:

> It is clear that the adjudication contemplated by the Bill is both comprehensive and efficient. As the general adjudication has been initiated by recent order of the Montana Supreme Court, it would seem that the greater wisdom lies in following *Colorado River*, and, on the basis of wise judicial administration, deferring to the comprehensive state proceedings. The federal proceedings are all in their infancy; service of process has been but recently completed. The state adjudication is thorough, as opposed to the piecemeal proceedings initiated by the Government. There is no jurisdictional question preliminarily attending the state adjudication; all such questions have been eliminated by the McCarran Amendment. The state forum will likely be more convenient, geographically, than the federal forum. The amount of time contemplated for completion of the state adjudication is significantly less than would be necessary for federal adjudication, insofar as the state has provided a special court system solely devoted to water rights adjudication. The federal judicial resources in Montana are limited; continued exercise of federal jurisdiction over the pending adjudications would either exhaust or severely deplete those resources for a substantial number of years, just by virtue of the number of parties involved. (In these cases, there are approximately 9,000 defendants.) The possibility of conflicting ad-

> judications by the concurrent forums also looms large and could be partially avoided only by staying the pending state adjudication, an action *Colorado River* has intimated is distinctly repugnant to a clear state policy and purpose.

484 F. Supp. at 36. Accordingly, "on the basis of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," the court ordered the cases dismissed. *Id.*

I agree with the district court. Water adjudication is essentially a local concern, and in every western state water scarcity poses a problem not just to Indians but to everyone. In my view, it is highly important that each state be accorded room for an effort to solve its water scarcity problem in the manner it regards as most appropriate. Here so long as Montana gives recognition to Indian water rights and their establishment pursuant to federal law, I see no good reason why Indians should not be joined with all other water users in the state in order to achieve a comprehensive state adjudication.

I would affirm.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos.	79-4887	80-3042
	80-3028	80-3044
	80-3032	80-3045
	80-3038	80-3061
	80-3040	80-3062
	80-3041	80-3063
DC#	75-6	79-33
	75-20	79-34
	79-21	79-40
	79-22	

THE NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION,

Plaintiff-Appellant,

v.

THOMAS RALPH ADSIT, et al.,

Defendants-Appellees.

(Filed April 5, 1982)

ORDER CLARIFYING OPINION

Before:

MERRILL, CHOY and FERGUSON, Circuit Judges.

The motion of plaintiff United States for clarification of the opinion issued herein is granted. The opinion is ordered amended as follows:

a. In the following passage on page — of — F. 2d — (slip op. at 726), "They" is ordered deleted. "The Indian tribes" shall be substituted for "They":

> The United States and the Indian tribes appeal that dismissal, arguing that it is predicated on an erroneous application of *Akin*. They maintain that because the Montana constitution and enabling act contain disclaimers of jurisdiction over Indian tribes, the litigation in that state differs from the Colorado litigation which was the subject of *Akin*.

b. In the following passage on page — of — F. 2d — (slip op. at 733), the italicized language is ordered deleted:

> The *United States and the* Tribes argue that conflicts among these interests would prevent the United States from representing them adequately. . . . Hence, *the United States and* the Tribes claim the Indians would be necessary parties over whom the state court has no jurisdiction.

(emphasis and ellipsis added.)

APPENDIX E

The NORTHERN CHEYENNE TRIBE OF the NORTHERN CHEYENNE INDIAN RESERVATION, Plaintiff,

v.

TONGUE RIVER WATER USERS ASSOCIATION, a corporation, et al., Defendants.

UNITED STATES of America, Plantiff,

v.

TONGUE RIVER WATER USERS ASSOCIATION et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

BIG HORN LOW LINE CANAL et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

Velva AASHEIM et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

Arvin S. AAGESON et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

AMS RANCH, INC. et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

Annette A. ABELL et al., Defendants.

Nos. CV-75-6-BLG, CV-75-20-BLG, CV-75-34-BLG, CV-79-40-BLG, CV-79-21-GF, CV-79-22-GF and CV-79-33-M.

United States District Court, D. Montana, Billings Division, Great Falls Division, Missoula Division.

Nov. 29, 1979.

MEMORANDUM AND ORDER

BATTIN, Chief District Judge and HATFIELD, District Judge.

Pending before the various divisions of this Court are several actions brought by the United States for the purpose of adjudicating the water rights of certain Indian tribes as well as Indian and non-Indian individuals in and to the waters of certain streams. This general stream adjudication is before this Court upon the plaintiffs' invocation of 28 U. S. C. § 1345. The State of Montana has moved to dismiss in certain of these cases, on the grounds that the courts of the State of Montana, rather than the federal courts, are the proper forum for adjudicating water rights. As the Court is faced with a question common to each of the captioned cases in addressing the State of Montana's motion, the cases have been jointly considered by the Judges of this Court before whom they are pending, and the State's motion jointly addressed. Upon consideration of each of the cases presently before the Court, we find that, based upon the decision of the Supreme Court in *Colorado River Conservation District v. United States*, 424 U. S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), and the policy of wise judicial administration affirmed therein, the State of Montana's motion to dismiss is well taken, and each of the captioned cases must be dismissed.

A. Jurisdiction

The water rights adjudications in issue have each been brought pursuant to 28 U. S. C. § 1345. That section provides that the district courts shall have jurisdiction over all civil actions brought by the Federal Government

"[e]xcept as otherwise provided by Act of Congress". In *Colorado River Conservation District v. United States*, the Supreme Court considered whether the McCarran Amendment is such an Act of Congress excepting federal jurisdiction under § 1345.

The Court found that the Amendment (which is uncodified) does not, by its terms, indicate any repeal of federal jurisdiction under § 1345 to entertain federal water suits. The Court further found that the immediate effect of the Amendment is to give consent to jurisdiction in the state courts concurrent with jurisdiction in the federal courts over controversies involving federal rights to the use of water. The Court's holding that the McCarran Amendment constituted consent to concurrent state jurisdiction also embraced consent to adjudication of Indian water rights.

> Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions. *United States v. District Court for Eagle Country* [sic], 401 U. S. 520, 91 S. Ct. 998, 28 L. Ed. 2d 278 rejected the conclusion that federal reserved rights in general were not reached by the Amendment for the reason that the Amendment "[deals] with an all-inclusive statute concerning 'the adjudication rights to the use of water of a river system.'" [Citations omitted.] This consideration applies as well to federal water rights reserved for Indian reservations.
>
> 424 U. S. at 810, 96 S. Ct. at 1243.

It is perfectly evident from the Court's holding in the *Colorado* case that not only does the McCarran Amendment permit concurrent state and federal jurisdiction over adjudication of federal water rights, but also is to be construed as reaching federal water rights reserved on be-

half of the Indians. By enacting the McCarran Amendment, the Government has in no way breached its special obligation to the tribes.

> Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the Amendment, would eventually be necessitated to resolve conflicting claims to a scarce resource. The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law.
>
> 424 U.S. at 812, 96 S.Ct. at 1243.

B. Abstention

Although this Court recognizes that it has jurisdiction over the subject matter of the instant actions under § 1345, it nonetheless finds merit in the State's motion to dismiss. Abstention, however, is not the judicial vehicle by which that end is properly attained. The *Colorado* case has carefully instructed us that the doctrine of abstention is narrow, and can only be invoked in certain limited instances. In determining that the district court erred in abstaining, the Supreme Court defined with some precision the instances in which abstention is proper. The Court found that the *Colorado* case fell without the grounds for abstention for the reason that, although

> state claims are involved in the case, the state law to be applied appears to be settled. No questions bearing on state policy are presented for decision. Nor will decision of the state claims impair efforts to implement state policy as in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424. To be sure, the federal claims that are involved in the

> case go to the establishment of water rights which may conflict with similar rights based on state law. But the mere potential for conflict in the results of adjudications does not, without more, warrant staying exercise of federal jurisdiction. [Citations omitted.] The potential conflict here, involving state claims and federal claims, would not be such as to impair impermissibly the State's effort to effect its policy respecting the allocation of state waters. Nor would exercise of federal jurisdiction here interrupt any such efforts by restraining the authority vested in state officers.
>
> 424 U. S. at 815, 816, 96 S. Ct. at 1245.

C. Policy of Wise Judicial Administration

Although the Court found that the *Colorado* case fell within none of the categories permitting abstention, the Court nonetheless upheld the district court's dismissal of the federal water adjudication. In examining the record, the Court found that principles bottomed on "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation", 424 U. S. at 817, 96 S. Ct. at 1246, made deference to the state courts by dismissal of the federal action proper. In so determining, the Court stated that the grounds for such dismissal are even more narrow than those for abstention, in view of the federal court's obligation to exercise its jurisdiction.

> Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited that the circumstances appropriate for abstention
>
> 424 U. S. at 818, 96 S. Ct. at 1246.

The Court illuminated those factors making dismissal proper. It determined that such factors as the inconvenience of the federal forum (in terms of distance from the situs of the action), the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums are proper for consideration.

> No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against exercise is required.
>
> 424 U.S. at 818, 819, 96 S.Ct. at 1247.

Further factors highlighted by the Court as meriting consideration include: in water rights litigation, the interdependency of the various rights; the availability of comprehensive state systems for adjudication of water rights; the stage of the proceedings in the federal court, beyond the filing of the complaint and the motion to dismiss; the extensive involvement of state water rights (in *Colorado*, 1,000 defendants were named); and the apparent design of the McCarran Amendment to avoid piecemeal or burdensome litigation.

By enactment of the last legislature of the State of Montana, Senate Bill 76, as yet uncodified has provided the vehicle for adjudicating claims of existing water rights in Montana. The provisions of that bill bear heavily upon this Court's decision to dismiss these cases on the basis of wise judicial administration.

In essence the Bill provides for adjudication of all existing water rights in the State of Montana. Section 6 of the Bill provides that:

(1) The action for the adjudication of all existing water rights under [this act] is commenced with the issuing of the order by the Montana supreme court to file a statement of a claim of an existing water right as provided in [section 16].

(2) The water judge for each division shall exercise jurisdiction over all matters concerning the determination and interpretation of existing water rights within his division. . . .

• • • • •

(4) All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in [section 16].

Section 16 of the Bill provides that:

(1) The Montana supreme court shall within 10 days of the filing of the petition by the attorney general issue an order to file a statement of a claim of an existing water right in substantially the following form:

"WATER RIGHTS ORDER

FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED. . . . This order is notice of commencement of procedures for the general adjudication of existing rights to the use of water and of the requirement to file a claim for certain existing rights to the use of water. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency of the state of Montana, and federal agency of the United States of America on its own

> behalf or as trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the department no later than June 30, 1983. . . ."

The above-cited sections reflect both the policy and the essential mechanism for adjudication of state water rights. Adjudication by adversary proceeding initiated by one claimant against all others in his drainage has been forsaken in favor of blanket adjudication of *all* claims, including federal and federal trust claims, in a systematic manner. The procedure outlined in the Bill is that of: (1) filing of an order by the Supreme Court requiring the filing by all claimants of statements of each claim; (2) upon filing of all claims, submission of the claims to the water judge in the division or district in which the claimed water is diverted; (3) through utilization of special masters, the rendering, by the water judge, on the basis of the filed claims, of a preliminary decree of water right; (4) after passage of time without objection to the preliminary decree, entry of a final decree of water right which is binding upon all parties; (5) if objection is timely taken by the claimant to the preliminary decree, judicial determination of the right, but without the necessity of joining all users in the claimant's drainage. It is clear that the adjudication contemplated by the Bill is both comprehensive and efficient. As the general adjudication has been initiated by recent order of the Montana Supreme Court, it would seem that the greater wisdom lies in following *Colorado River*, and, on the basis of wise judicial administration, deferring to the comprehensive state proceedings. The federal proceedings are all in their infancy; service of process has

been but recently completed. The state adjudication is thorough, as opposed to the piecemeal proceedings initiated by the Government. There is no jurisdictional question preliminarily attending the state adjudication; all such questions have been eleminated by the McCarran Amendment. The state forum will likely be more convenient, geographically, than the federal forum. The amount of time contemplated for completion of the state adjudication is significantly less than would be necessary for federal adjudication, insofar as the state has provided a special court system solely devoted to water rights adjudication. The federal judicial resources in Montana are limited; continued exercise of federal jurisdiction over the pending adjudications would either exhaust or severely deplete those resources for a substantial number of years, just by virtue of the number of parties involved. (In these cases, there are approximately 9,000 defendants.) The possibility of conflicting adjudications by the concurrent forums also looms large and could be partially avoided only by staying the pending state adjudication, an action *Colorado River* has intimated is distinctly repugnant to a clear state policy and purpose.

Therefore, on the basis of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.

IT IS ORDERED that the above-captioned cases be, and the same hereby are, dismissed.

APPENDIX F

THE MONTANA WATER USE ACT
§§ 89-865 - 89-8-111, R. C. M. 1947:

89-865. Short title. This act shall be known and may be cited as the "Montana Water Use Act."

History: En. Sec. 1, Ch. 452, L. 1973.

89-866. Declaration of policy and purpose. (1) Pursuant to article IX of the Montana constitution, the legislature declares that any use of water is a public use, and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this act.

(2) A purpose of this act is to implement article IX, section 3(4) of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation and future beneficial use and development of Montana's water for the state and its citizens, and for the continued development and completion of the comprehensive state water plan.

(3) It is the policy of this state and a purpose of this act to encourage the wise use of the state's water resources by making them available for appropriation consistent with this act, and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the

least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities which store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana, for the stabilization of stream flows, and for groundwater recharge.

(4) Pursuant to article IX, section 3(4) of the Montana constitution, it is further the policy of this state and a purpose of this act to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.

History: En. Sec. 2, Ch. 452, L. 1973.

89-867. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including geothermal water and diffuse surface water.

(2) "Beneficial use" means a use of water for the benefit of the appropriator, other persons, or the public, including, but not limited to, agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. A use of water for slurry to export coal from Montana is not a beneficial use. Slurry is a mixture of water and insoluble matter.

(3) "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a public agency, to reserve water in accordance with 89-890.

(4) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

(5) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

(6) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(7) "Permit" means the permit to appropriate issued by the department under 89-880 through 89-887.

(8) "Certificate" means the certificate of water right issued by the department under 89-879, 89-880(5), and 89-888.

(9) "Declaration" means the declaration of an existing right filed with the department under 89-872.

(10) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(11) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water, but not a private corporation, association, or group.

(12) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

(13) "Department" means the department of natural resources and conservation provided for in Title 82A, chapter 15.

(14) "Board" means the board of natural resources and conservation provided for in 82A-1509.

History: En. Sec. 3, Ch. 452, L. 1973; amd. Sec. 1, Ch. 192, L. 1974; amd. Sec. 1, Ch. 485, L. 1975; amd. Sec. 1, Ch. 416, L. 1977; amd. Sec. 7, Ch. 460, L. 1977.

89-868. Powers and duties of department. (1) The department shall:

(a) enforce and administer this act and rules adopted by the board under section 5 [89-869];

(b) prescribe procedures, forms, and requirements for applications, permits, certificates, declarations, and proceedings under this act, and prescribe the information to be contained in any application, declaration or other document to be filed with the department under this act;

(c) keep in its Helena office a centralized public record of permits, certificates, declarations, applications, and other documents filed in its office under this act;

(d) co-operate with, assist, advise, and co-ordinate plans and activities with the federal, state, and local agencies in matters relating to this act;

(e) upon request by any person, co-operate with, assist, and advise that person in matters pertaining to measuring water or filing declarations with the department under this act.

(2) The department may:

(a) enter into agreements with federal, state, or local agencies necessary to carry out this act;

(b) apply for, accept, administer, and expend funds, grants, gifts, and loans from the federal government or any other public or private source for the purposes of this act.

History: En. Sec. 4, Ch. 452, L. 1973.

89-869. Powers and duties of board. (1) The board may prescribe fees or service charges for any public service rendered by the department under this act or under Title 89, chapter 29, including fees for the filing of applications or for the issuance of permits and certificates. There shall be no fees for the filing of declarations or for the issuance of certificates of existing rights.

(2) The board may adopt rules necessary to implement and carry out the purposes and provisions of this act. These rules may include, but are not limited to, rules to:

(a) govern the issuance and terms of interim permits authorizing an applicant for a regular permit under this act to begin appropriating water immediately, pending final approval or denial by the department of the application for a regular permit;

(b) require the owner or operator of appropriation facilities to install and maintain suitable controlling and measuring devices;

(c) require the owner or operator of appropriation facilities to report to the department the readings of measuring devices at reasonable intervals, and to file reports on appropriations; and

(d) regulate the construction, use and sealing of wells to prevent the waste, contamination or pollution of groundwater.

(3) The board shall adopt rules providing for and governing temporary emergency appropriations, without prior application for a permit, necessary to protect lives or property.

History: En. Sec. 5, Ch. 452, L. 1973; amd. Sec. 1, Ch. 238, L. 1974; amd. Sec. 2, Ch. 485, L. 1975.

89-870. Determination of existing rights. (1) The department shall establish a centralized record system of all existing rights, and the department shall, as soon as practicable, begin proceedings under this act to determine existing rights. To accomplish this, the department shall gather data essential to the proper understanding and determination of those existing rights.

(2) The department may select and specify areas or sources where the need for a determination of existing rights is most urgent, and first begin proceedings under this act to determine the existing rights in those areas or sources.

History: En. Sec. 6, Ch. 452, L. 1973.

89-871. Data for determination of existing rights. The data gathered by the department for the determination of existing rights shall include, but are not limited to:

(1) court decrees adjudicating water rights in a proceeding commenced prior to the effective date of this act. Upon request of the department, the clerks of the district courts shall furnish the department copies of all decrees affecting water rights;

(2) declarations of existing rights filed under section 8 [89-872];

(3) records of rights acquired under the groundwater code (sections 89-2911 through 89-2936);

(4) notices of appropriation filed under sections 89-801.2 and 89-810;

(5) records of declarations filed under sections 89-121 and 89-813;

(6) records of statements filed under section 89-907;

(7) the findings of water resource surveys conducted by the department and its predecessor agencies;

(8) the findings of inspections, surveys, reconnaissance, and investigations of the area or source involved as the department makes.

History: En. Sec. 7, Ch. 452, L. 1973.

89-872. Declarations of existing rights. (1) The department shall obtain from the district court an order pursuant to section 89-873 requiring each person claiming an existing right within a specified area or from a specified source to file a declaration of existing right within one (1) year after the effective date of the order. The department shall publish notice of the order once a week for four (4) consecutive weeks prior to its effective date in a newspaper of general circulation in the affected area. Before the last date of publication, the department shall also serve a copy of the order by certified mail upon each appropriator or his successor in interest within the specified area or from the specified source who has requested mailed notice of the order or of whom the de-

partment can readily obtain knowledge, and to each person owning or being possessed of lands bordering on the stream or source as ascertained from the land ownership records of the appropriate county. The department shall file in its records proof of service of the notice by affidavit of the publisher in the case of notice by publication, and by its own affidavit in the case of service by mail.

(a) The department of fish and game may represent the public for purposes of establishing any prior and existing public recreational use in existing right determinations under this act, provided that the foregoing shall not be construed in any manner as a legislative determination of whether or not a recreational use sought to be established prior to July 1, 1973, is or was a beneficial use.

(2) A declaration shall be made under oath by each person claiming an existing right to use water within the specified area or from the specified source on a form provided by the department. The department shall make the forms available through its offices and the offices of the county clerks and recorders. The information required by the department may include, but is not limited to, the date of appropriation, the date the water was first applied to a beneficial use, the amount of water appropriated, the purpose of the appropriation, the place and means of diversion, the place of use, the time during which the water is diverted and used each year, and a true copy or the docket number of any judicial decree, notice, or other claim or evidence upon which the existing right was initiated or is based.

(3) Declarations shall be sent to the department by certified mail, with a return receipt requested. The re-

turn receipt is conclusive evidence of receipt, by the department, of the declaration.

History: En. Sec. 8, Ch. 452, L. 1973; amd. Sec. 1, Ch. 265, L. 1974; amd. Sec. 3, Ch. 485, L. 1975.

89-873. Filing of petition. (1) Proceedings for the determination of existing rights shall be commenced by the department in the district court of the judicial district in which the source or area is located. The department shall request by petition, and the district court shall issue an order requiring each person claiming an existing right within a specified area or from a specified source to file a declaration as provided in section 89-872.

(2) If the source or area is in two (2) or more judicial districts, the department shall notify the district court of each of the judicial districts of its intent to file the petition. Within thirty (30) days of receipt of the notice, the judges of those district courts shall agree on which district shall receive the petition and shall notify the department of their decision. If the district judges fail to agree or to notify the department, the department shall file the petition in the district court of the judicial district in which it determines that the greatest number of existing rights are likely to be located.

History: En. Sec. 9, Ch. 452, L. 1973; amd. Sec. 4, Ch. 485, L. 1975.

89-874. Contents of petition. (1) Within a reasonable time after gathering all data necessary under section 89-871, the department shall file with the district court the names of all persons who have filed declarations under section 89-872 and of all other persons who appear from the data gathered by the department to have existing

rights to the use of waters within the specified area or from the specified source.

(2) The department shall also file with the district court all data gathered under section 89-871.

(3) If the district court determines that additional data is necessary prior to issuing the preliminary decree in order to determine the extent of an existing right, it may direct the department or the person claiming the right to obtain the necessary data.

History: En. Sec. 10, Ch. 452, L. 1973; amd. Sec. 5, Ch. 485, L. 1975.

89-875. Preliminary decree. (1) Within a reasonable time after the department files with the district court the material required by section 89-874, the court shall issue a preliminary decree. The preliminary decree shall be based on the data submitted by the department and on any additional data obtained by the court.

(2) The preliminary decree shall contain the information, and make the determinations, findings, and conclusions, required for the final decree under section 89-877.

(3) The district court shall send a copy of the preliminary decree to the department, and the department shall serve by mail or by personal service a copy of the preliminary decree to each person named in the material submitted under section 89-874 or named in the preliminary decree. The department shall file proof of service with the district court.

(4) A person named in the material or in the preliminary decree may inspect the data upon which the de-

cree is based at any time, and he may purchase copies of any of the data.

History: En. Sec. 11, Ch. 452, L. 1973; amd. Sec. 6, Ch. 485, L. 1975; amd. Sec. 2, Ch. 416, L. 1977.

89-876. Hearing on preliminary decree. (1) The department or a person named in the material filed under section 89-874 or named in the preliminary decree, or any other person for good cause shown, who objects to the preliminary decree is entitled to a hearing thereon before the district court.

(2) A request for a hearing shall be filed with the district court, and a copy served on the department by certified mail, within ninety (90) days after receipt of the preliminary decree. The district court shall, for good cause shown, reasonably extend this time limit if application for the extension is made within ninety (90) days after receipt of the preliminary decree. A person requesting a hearing on his objections to the preliminary decree shall also serve, by certified mail with return receipt requested, a copy of his request on any person whose rights or priorities will be affected if the objections are sustained in the hearing. The rights and priorities of a person who is not served shall not be affected by the result of the hearing.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions, in the preliminary decree, with which the person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

The request shall also state the names of all other persons on whom it is served.

(4) If more than one person requests a hearing on objections to the preliminary decree, the court may in its discretion hold a single hearing. Each hearing shall be conducted as are other civil actions, but the parties to the hearing may by agreement and with the court's permission waive any of the procedural or evidentiary rules, or may submit only written evidence. Only evidence which is referred to in a request may be introduced in a hearing.

(5) In each hearing, the department shall be a party and is entitled to be heard on objections made by any person. The department shall be granted adequate time, prior to a hearing, to gather evidence pertinent to any objection to be heard in the hearing.

History: En. Sec. 12, Ch. 452, L. 1973; amd. Sec. 7, Ch. 485, L. 1975.

89-877. Final decree. (1) The court shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying the preliminary decree. If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the court shall enter it as the final decree.

(2) The final decree shall establish the existing rights and priorities, of the persons named in the petition, for the source or area under consideration.

(3) The final decree shall state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person named in the decree are based.

(4) For each person who is found to have an existing right, the final decree shall state:

(a) the name and post-office address of the owner of the right;

(b) the amount of water, rate and volume, included in the right;

(c) the date of priority of the right;

(d) the purpose for which the water included in the right is used;

(e) the place of use and a description of the land to which the right is appurtenant;

(f) the source of the water included in the right;

(g) the place and means of diversion;

(h) the approximate time during which the water is used each year;

(i) any other information necessary to fully define the nature and extent of the right.

(5) The final decree in each existing right determination is final and conclusive as to all existing rights in the source or area under consideration. After the final decree there shall be no existing rights to water in the area or source under consideration except as stated in the decree.

History: En. Sec. 13, Ch. 452, L. 1973; amd. Sec. 3, Ch. 416, L. 1977.

89-878. Appeals from final decree. (1) A person whose existing rights and priorities are determined in the final decree may appeal the determination only if:

(a) he requested a hearing and appeared and entered objections to the preliminary decree; or

(b) his rights as determined in the preliminary decree were altered as the result of a hearing, at which he appeared, requested by another person.

(2) An appeal from the final decree shall be taken as provided by the Montana Rules of Appellate Civil Procedure.

History: En. Sec. 14, Ch. 452, L. 1973.

89-879. Certificate of water right. When a final decree is entered, the court shall send a copy to the department. The department shall, on the basis of the final decree, issue to each person decreed an existing right a certificate of water right. The original of the certificate shall be sent to the county clerk and recorder, in the county where the point of diversion or place of use is located, for recordation. The department shall keep a copy of the certificate in its office in Helena. After recordation, the clerk and recorder shall send the certificate to the person to whom the right is decreed.

History: En. Sec. 15, Ch. 452, L. 1973.

89-880. Right to appropriate—application for permit. (1) After July 1, 1973, a person may not appropriate water except as provided in this act. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription or estoppel; the method prescribed by this act is exclusive.

(2) Except as otherwise provided in subsection (5) of this section, a person may not appropriate water or commence construction of diversion, impoundment, with-

drawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerks and recorders. The department shall return a defective application for correction or completion together with the reasons for returning it. An application does not lose priority of filing because of defects, if the application is corrected, completed and refiled with the department within thirty (30) days after its return to the applicant, or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 18 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 18 months shall be terminated.

(3) The department may cease action upon an application for a permit and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for any of these reasons shall be accompanied by a statement of the reasons for which it was returned, and there shall be no right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection shall be deemed a final decision of the department.

(4) A permit issued prior to a final determination of existing rights is provisional and is subject to that final determination. The amount of the appropriation granted

in a provisional permit shall be reduced or modified where necessary to protect and guarantee existing rights determined in the final decree. A person may not obtain any vested right, to an appropriation obtained under a provisional permit, by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action, where the permit would have been denied or modified if the final decree had been available to the department.

(5) (a) Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating groundwater by means of a well with a maximum yield of less than 100 gallons a minute. Within 60 days of completion of the well and appropriation of the groundwater for beneficial use, the appropriator shall file notice of completion on a form provided by the department at its offices and at the offices of the county clerks and recorders. Upon receipt of the notice, the department shall automatically issue a certificate of water right. The original of the certificate shall be sent to the county clerk and recorder, in the county where the point of diversion or place of use is located, for recordation. The department shall keep a copy of the certificate in its office in Helena. After recordation, the clerk and recorder shall send the certificate to the appropriator. The date of filing of the notice of completion is the date of priority of the right.

(b) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is from a source other than a perennial flowing stream. As used

in this subsection, a perennial flowing stream means a stream which historically has flowed continuously at all seasons of the year, during dry as well as wet years. However, before constructing the impoundment or pit, the appropriator shall apply for a permit as prescribed by this act. If the department determines after processing the application that the rights of other appropriators have been or will be adversely affected, it may require the applicant to modify the construction of the impoundment or pit, and issue the permit subject to such terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriators.

(6) A person who desires to convert a nonproductive oil or gas well to a water well may do so immediately, but shall file a notice of completion or apply for a permit, depending on the maximum yield of the well, as otherwise provided in this act. The date of appropriation shall be the date of filing the notice of completion or the application for a permit.

(7) A person may also appropriate water, without applying for or prior to receiving a permit, under rules adopted by the board under section 89-869 of this act.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977.

89-881. Notice of application. (1) Upon receipt of a proper application for a permit, the department shall prepare a notice containing the facts pertinent to the application and shall publish the notice in a newspaper of general circulation in the area of the source once a week for three (3) consecutive weeks. Before the last date of publica-

tion, the department shall also serve the notice by certified mail upon an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation. A notice shall also be served upon any public agency that has reserved waters in the source under section 89-890. The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation. The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication, and by its own affidavit in the case of service by mail.

(2) The notice shall state that by a date set by the department (not less than thirty (30) days nor more than sixty (60) days after the last date of publication) persons may file with the department written objections to the application.

(3) The requirements of subsections (1) and (2) of this section do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons.

History: En. Sec. 17, Ch. 452, L. 1973; amd. Sec. 9, Ch. 485, L. 1975.

89-882. Objections. (1) An objection to an application must be filed by the date specified by the department under section 17 (2) [89-881 (2)].

(2) The objection must state the name and address of the objector, and facts tending to show that there are no unappropriated waters in the proposed source, that the

proposed means of appropriation are inadequate, that the property, rights, or interests of the objector would be adversely affected by the proposed appropriation, or the objector may state any other objections to the proposed appropriation he considers pertinent.

History: En. Sec. 18, Ch. 452, L. 1973.

89-883. Hearings on objections. If the department determines that an objection to an application for a permit states a valid objection to the issuance of the permit, it shall hold a public hearing on the objection within sixty (60) days from the date set by the department for the filing of objections, after serving notice of the hearing by certified mail upon the applicant and the objector. The department may consolidate hearings if more than one (1) objection is filed to an application. The department shall file in its records proof of the service by affidavit of the department.

History: En. Sec. 19, Ch. 452, L. 1973.

89-884. Action on application. (1) The department shall grant, deny, or condition an application for a permit in whole or in part within one hundred twenty (120) days after the last date of publication of the notice of application if no hearing is held, and within one hundred eighty (180) days if a hearing is held; however, in either case the time may be extended upon agreement of the applicant, or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, not more than 60 days upon order of the department. If the department orders the time extended it shall serve a notice of the extension and the reasons therefor by certified mail upon the applicant and each person who has filed an objection as provided by section 89-882.

(2) However, an application may not be approved in a modified form or upon terms, conditions, or limitations specified by the department, nor denied, unless the applicant is first granted an opportunity to be heard. If no objection is filed against the application, but the department is of the opinion that the application should be approved in a modified form or upon terms, conditions or limitations specified by it, or that the application should be denied, the department shall prepare a statement of its opinion and the reasons therefor. The department shall serve a statement of its opinion by certified mail upon the applicant, together with a notice that the applicant may obtain a hearing by filing a request therefor within thirty (30) days after the notice is mailed. The notice shall further state that the application will be modified in a specified manner, or denied, unless a hearing is requested.

History: En. Sec. 20, Ch. 452, L. 1973; amd. Sec. 10, Ch. 485, L. 1975; amd. Sec. 5, Ch. 416, L. 1977.

89-885. Criteria for issuance of permit. The department shall issue a permit if:

(1) there are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion or construction are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more or 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

History: En. Sec. 21, Ch. 452, L. 1973; amd. Sec. 1, Ch. 156, L. 1975; amd. Sec. 1, Ch. 307, L. 1977; amd. Sec. 6, Ch. 416, L. 1977.

89-886. Terms of permit: (1) The department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. It may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, and it may issue temporary or seasonal permits. A permit shall be issued subject to existing rights and any final determination of those rights made under this act.

(2) The department may limit the time for commencement of the appropriation works, completion of construction and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the

project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. For good cause shown by the permittee, the department may in its discretion reasonably extend time limits.

(3) The original of the permit shall be sent to the county clerk and recorder in the county where the point of diversion or place of use is located for recordation, and a copy shall be kept in the office of the department in Helena. After recordation, the clerk and recorder shall send the permit to the permittee.

History: En. Sec. 22, Ch. 452, L. 1973.

89-887. Revocation of permit. If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof, or if the water is not being applied to the beneficial use contemplated in the permit, or if the permit is otherwise not being followed, the department may after notice require the permittee to show cause why the permit should not be revoked. If the permittee fails to show sufficient cause, the department may revoke the permit.

History: En. Sec. 23, Ch. 452, L. 1973.

89-888. Certificate of water right. (1) Upon actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the department that the appropriation has been properly completed. The department may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the

permittee a certificate of water right. The original of the certificate shall be sent to the county clerk and recorder in the county wherein the point of diversion or place of use is located for recordation, and a duplicate shall be kept in the office of the department in Helena. After recordation, the clerk and recorder shall send the certificate to the appropriator.

(2) Except as provided in section 16 (4) [89-880 (4)] of this act, a certificate of water right in a particular source may not be issued prior to a general determination under this act of existing rights in that source.

History: En. Sec. 24, Ch. 452, L. 1973.

89-889. Reservoirs. A person intending to appropriate water by means of a reservoir shall apply for a permit as prescribed in this act.

History: En. Sec. 25, Ch. 452, L. 1973.

89-890. Reservation of waters. (1) The state or any political subdivision or agency thereof, or the United States or any agency thereof, may apply to the board to reserve waters for existing or future beneficial uses, or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates.

(2) Upon receiving an application, the department shall proceed in accordance with sections 89-881 through 89-883. After the hearing provided in section 89-883, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records, incurred in acting upon the application to reserve

water, except the cost of salaries of the department's personnel, shall be paid by the applicant.

(3) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction of the board:

(a) the purpose of the reservation;

(b) the need for the reservation;

(c) the amount of water necessary for the purpose of the reservation;

(d) that the reservation is in the public interest. If the purpose of the reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the board that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

(4) After the adoption of an order reserving waters, the department may reject an application and refuse a permit for the appropriation of reserved waters, or may, with the approval of the board, issue the permit subject to such terms and conditions it considers necessary for the protection of the objectives of the reservation.

(5) A reservation under this section shall date from the date the order reserving the water is adopted by the board, and shall not adversely affect any rights in existence at that time.

(6) The board shall, periodically but at least once every 10 years, review existing reservations to ensure that the objectives of the reservation are being met. Where the

objectives of the reservation are not being met, the board may extend, revoke or modify the reservation.

History: En. Sec. 26, Ch. 452, L. 1973; amd. Sec. 11, Ch. 485, L. 1975; amd. Sec. 7, Ch. 416, L. 1977.

89-891. Priority. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow, or the lowering of a water table, artesian pressure or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions.

(2) Priority of appropriation made under this act dates from the filing of an application for a permit with the department, except as otherwise provided in section 16 [89-880] of this act.

(3) Priority of appropriation perfected before the effective date of this act shall be determined as provided in sections 6 through 15 [89-870 through 89-879] of this act.

History: En. Sec. 27, Ch. 452, L. 1973.

89-891.1. Water turned into natural channels. Water appropriated under an existing right or pursuant to this act may be turned into the natural channel of another stream, or from a reservoir into the natural channel, and withdrawn or diverted at a point downstream for beneficial use, but the waters of that stream may not thereby be diminished in quantity or deteriorated in quality to the detriment of a prior appropriator. Water stored in a reservoir under an existing right or pursuant to this act which is turned into a natural channel for withdrawal or diver-

sion and beneficial use downstream shall not be considered a part of the natural flow of that stream.

History: En. 89-891.1 by Sec. 1, Ch. 103, L. 1974.

89-892. Changes in appropriation rights. (1) An appropriator may not change the place of diversion, place of use, purpose of use or place of storage except as permitted under this section and approved by the department.

(2) The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with section 89-881. If the department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of section 89-882 (2), and hearings shall be held in accordance with section 89-883.

(3) An appropriator of more than fifteen (15) cubic feet per second may not change the purpose of use of an appropriation right from an agricultural use to an industrial use.

(4) The department may approve a change subject to such terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, including limitations on the time for completion of the change.

(5) If a change is not completed as approved by the department or if the terms, conditions, restrictions, and

limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

History: En. Sec. 28, Ch. 452, L. 1973; amd. Sec. 3, Ch. 238, L. 1974; amd. Sec. 1, Ch. 338, L. 1975; amd. Sec. 8, Ch. 416, L. 1977.

89-893. Transfer of appropriation right. (1) The right to use water under a permit or certificate of water right shall pass with a conveyance of the land, or transfer by operation of law, unless specifically exempted therefrom. All transfers of interests in appropriation rights shall be without loss of priority.

(2) The person receiving the appropriation interest shall file with the department notice of the transfer on a form prescribed by the department.

(3) An appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, or sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands, without obtaining prior approval from the department. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with section 89-881. If the department then determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change,

the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of section 89-882 (2) and hearings shall be held in accordance with section 89-883.

History: En. Sec. 29, Ch. 452, L. 1973; amd. Sec. 4, Ch. 238, L. 1974.

89-894. Abandonment of appropriation right. (1) If an appropriator ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the right, or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right shall, to that extent, be deemed considered abandoned and shall immediately expire.

(2) If an appropriator ceases to use all or part of his appropriation right, or ceases using his appropriation right according to its terms and conditions, for a period of ten (10) successive years, and there was water available for his use, there shall be a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used.

(3) This section does not apply to existing rights until they have been determined in accordance with this act.

History: En. Sec. 30, Ch. 452, L. 1973.

89-895. Procedure for declaring appropriation rights abandoned. (1) When the department has reason to believe that an appropriator may have abandoned his appropriation right under section 30 [89-894], or when another appropriator in the opinion of the department files a valid claim that he has been or will be injured by the re-

sumption of use of an appropriation right alleged to have been abandoned, the department shall petition the district court which determined the existing rights in the source of the appropriation in question to hold a hearing to determine whether the appropriation right has been abandoned. Proceedings under this section shall be conducted in accordance with the Montana Rules of Civil Procedure, and appeal shall be taken in accordance with the Montana Rules of Appellate Civil Procedure.

(2) At the hearing, the burden of proof shall be on the department which must establish by a preponderance of the evidence that the appropriation has been abandoned under section 30 [89-894] of this act.

(3) The determination of the court shall be appended to the final decree. The department shall keep a copy of the determination in its office in Helena.

History: En. Sec. 31, Ch. 452, L. 1973.

89-896. Supervision of water distribution. (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to the effective date of this act. The supervision shall be governed by the principle that first in time is first in right.

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to sections 89-870 through 89-879, any party to the controversy may petition the district court for relief. The department shall be served with process in any proceeding under this subsection and shall, within a reasonable time thereafter, notify the court wheth-

or it intends in its discretion, within a reasonable time, to begin proceedings to determine existing rights in the source, in accordance with this act. The department may, if it declines to commence proceedings to determine existing rights in the source, intervene as a party in the proceeding. The district court from which relief is sought may grant such injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo pending the department's decision whether to determine existing rights in the source, or the department's decision to intervene as a party, as the case may be. If the department does not proceed to obtain a determination of existing rights, the district court shall settle only the controversy between the parties.

(3) A controversy between appropriators from a source which has been the subject of a general determination of existing rights under sections 89-870 through 89-879 shall be settled by the district court which issued the final decree. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree. In cases involving permits issued by the department, the court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. The order settling the controversy shall be appended to the final decree, and a copy shall be filed with the department. The department shall be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding.

History: En. Sec. 32, Ch. 452, L. 1973; amd. Sec. 12, Ch. 485, L. 1975.

89-897. Prevention of waste. (1) If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, or preventing water from moving to another person having a prior right to use the same, it may petition the district court to:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water, or to secure water to a person having a prior right to its use; the department may attach to the controlling works a written notice properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it, which notice shall be legal notice to all persons interested in the appropriation or distribution of the water; or

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so, and to take such steps as may be necessary to remedy the waste, unlawful use, or interference; or

(2) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin such waste, unlawful use, or interference.

History: En. Sec. 33, Ch. 452, L. 1973.

89-898. Entry on land—inspections. Any employee or agent of the department authorized by the director may enter upon any land to carry out the purpose of this act, including, but not limited to, entry to make inspections the department considers necessary of proposed works, source of water, location of the proposed use, construc-

tion of works and other inspections to ascertain whether or not persons are complying with this act. The department or its agent shall give reasonable notice to the landowner of its intention to enter upon the land. The department is responsible for actual damages done to any property.

History: En. Sec. 34, Ch. 452, L. 1973.

89-899. Legal assistance. (1) When requested by the department, the attorney general and the county attorneys within their respective counties shall perform legal services and conduct legal proceedings necessary to carry out the purposes of this chapter. The department may also employ legal counsel to enforce this chapter and to conduct proceedings under it.

(2) If an appropriator who is a citizen of Montana becomes involved in a controversy to which any agency of the federal government or another state is a party, the department may in its discretion intervene as a party or provide necessary legal assistance to the citizen of Montana.

History: En. Sec. 35, Ch. 452, L. 1973; amd. Sec. 9, Ch. 460, L. 1977.

89-8-100. Administrative proceedings. The Montana Administrative Procedure Act (Title 82, chapter 42, R.C.M. 1947) governs administrative proceedings conducted under this act, except that the common law and statutory rules of evidence shall apply only upon stipulation of all parties to a proceeding.

History: En. Sec. 36, Ch. 452, L. 1973; amd. Sec. 13, Ch. 485, L. 1975; amd. Sec. 9, Ch. 416, L. 1977.

89-8-100.1. Recovery of attorney fees by prevailing party. If a final decision of the department on an application for a permit is appealed to district court, the district court shall award the prevailing party reasonable attorney fees.

History: En. 89-8-100.1 by Sec. 11, Ch. 416, L. 1977.

89-8-101. Penalties. A person who violates or refuses or neglects to comply with sections 16 (1), 28 (1), and 29 (3) [89-880 (1), 89-892 (1), and 89-893 (3)] of this act, or of any order of the department, or of any rule of the board, is guilty of a misdemeanor.

History: En. Sec. 37, Ch. 452, L. 1973.

89-8-102. Deposit of fees and penalties. All fees and penalties collected under this act shall be deposited in the state general fund. All penalties or fines imposed by any court for a violation of this act shall be deposited in the general fund of the county where the court presides and shall be disposed of in the same manner as any other penalty or fine.

History: En. Sec. 38, Ch. 452, L. 1973.

89-8-102.1. Saving clause. Nothing in this act abates or otherwise adversely affects the validity of any filing, notice, or judicial proceeding commenced under the law as it existed before July 1, 1973.

History: En. 89-8-102.1 by Sec. 14, Ch. 485, L. 1975.

89-8-102.2. Fees for environmental impact statements. (1) Whenever the department determines that the filing of an application (or a combination of applications) for a permit or approval under this chapter requires the

preparation of an environmental impact statement as prescribed by the Montana Environmental Policy Act (Title 69, chapter 65, R.C.M. 1947), and the application (or combination of applications) involves the use of ten thousand (10,000) or more acre feet per year or fifteen (15) or more cubic feet per second of water, the applicant shall pay to the department the fee prescribed in this section. The department shall notify the applicant in writing within thirty (30) days of receipt of a correct and complete application (or a combination of applications), if it determines that an environmental impact statement and fee is required.

(2) Upon notification by the department under subsection (1) of this section, the applicant shall pay a fee based upon the estimated cost of constructing, repairing or changing the appropriation and diversion facilities as herein provided. The maximum fee that shall be paid to the department may not exceed the fees set forth in the following declining scale: two percent (2%) of the estimated cost up to one million dollars ($1,000,000); plus one percent (1%) of the estimated cost over one million dollars ($1,000,000) and up to twenty million dollars ($20,000,000); plus one-half of one percent (0.5%) of the estimated cost over twenty million dollars ($20,000,000) and up to one hundred million dollars ($100,000,000); plus one-quarter of one percent (0.25%) of the estimated cost over one hundred million dollars ($100,000,000) and up to three hundred million dollars ($300,000,000); plus one-eighth of one percent (.125%) of the estimated cost over three hundred million dollars ($300,000,000). The fee shall be deposited in the earmarked revenue fund to be used by the department only to comply with the Montana Environmental Policy Act in connection with the appli-

cation(s). Any amounts paid by the applicant but not actually expended by the department shall be refunded to the applicant.

(3) The department and the applicant may determine by agreement the estimated cost of any facility for purposes of computing the amount of the fee to be paid to the department by the applicant. The department may contract with an applicant for:

(a) the development of information by the applicant or a third party on behalf of the department and the applicant concerning the environmental impact of any proposed activity under an application;

(b) the division of responsibility between the department and an applicant for supervision over, control of, and payment for the development of information by the applicant or a third party on behalf of the department and the applicant under any such contract or contracts;

(c) the use or nonuse of a fee or any part thereof paid to the department by an applicant.

(4) Any payments made to the department or any third party by an applicant under any such contract or contracts shall be credited against any fee the applicant must pay hereunder. The department and the applicant may agree on additional credits against the fee for environmental work performed by the applicant's own expense.

(5) No fee as prescribed by this section may be assessed against an applicant for a permit or approval if the applicant has also filed an application for a cer-

tificate of environmental compatibility or public need pursuant to the Montana Major Facility Siting Act (Title 70, chapter 8, R.C.M. 1947), and the appropriation or use of water involved in the application(s) for permit or approval has been or will be studied by the department pursuant to that act.

(6) This act shall apply to all applications, pending or hereinafter filed, for which the department has not, as of the effective date of this act, commenced writing an environmental impact statement. This act shall not apply to any application the fee for which would not exceed two thousand five hundred dollars ($2,500).

(7) Failure to submit the fee as required by this section shall void the application(s).

(8) The department may, in its discretion, rely upon the environmental studies, investigations, reports, and assessments made by any other state agency or any person, including any applicant, in the preparation of its environmental impact statement.

History: En. 89-8-102.2 by Sec. 1, Ch. 356, L. 1975; amd. Sec. 1, Ch. 117, L. 1977.

89-8-103. Statement of legislative findings and policy. The legislature, noting that appropriations have been claimed, that applications have been filed for, and that there is further widespread interest in making substantial appropriations of water in the Yellowstone River Basin, finds that these appropriations threaten the depletion of Montana's water resources to the significant detriment of existing and projected agricultural, municipal, recreational and other uses, and of wildlife and aquatic habitat. The legislature further finds that these appro-

priations foreclose the options to the people of this state to utilize water for other future beneficial purposes, including municipal water supplies, irrigation systems, and minimum flows for the protection of existing rights and aquatic life. The legislature pursuant to its mandate and authority under article IX of the Montana constitution, declares that it is the policy of this state that before these proposed appropriations are acted upon existing rights to water in the Yellowstone basin must be accurately determined for their protection, and that reservations of water within the basin must be established as rapidly as possible for the preservation and protection of existing and future beneficial uses.

History: En. 89-8-103 by Sec. 1, Ch. 116, L. 1974.

89-8-104. Definitions. Unless the context clearly requires otherwise, in this act:

(1) "Department" means the department of natural resources and conservation.

(2) "Basin" means the Yellowstone River Basin.

(3) "Application" means an application for a permit under the Montana Water Use Act to appropriate surface water from any source of supply within the basin for either or both of the following purposes:

(a) a reservoir with a total planned capacity of fourteen thousand (14,000) acre feet or more, or

(b) for a flow rate greater than twenty (20) cubic feet of water per second.

The term also includes an application for approval under section 89-892, R.C.M. 1947, to change the purpose of use.

(4) "Reservation" means a reservation of water provided for by section 89-890 of the Montana Water Use Act.

History: En. 89-8-104 by Sec. 2, Ch. 116, L. 1974.

89-8-105. Suspension of action. (1) The department may not grant or otherwise take any action on an application until one of the following first occurs:

(a) the board of natural resources and conservation makes a final determination on the applications for reservations of water in the basin filed before January 1, 1977, in accordance with 89-890;

(b) a final determination of existing rights has been made in the source of supply in accordance with the Montant Water Use Act; or

(c) January 1, 1978; however, if a court stays or enjoins the continuance of proceedings on any pending application for reservation of water in the basin filed before January 1, 1977, and such stay or injunction prevents the board from making a final determination on such application before January 1, 1978, the court shall extend this date by the length of delay incurred. The court may not extend this date beyond January 15, 1979.

(2) A reservation established before such application for permit is granted is a preferred use over the right to appropriate water pursuant to the permit, and the permit, if granted, shall be issued subject to that preferred use.

History: En. 89-8-105 by Sec. 3, Ch. 116, L. 1974; amd. Sec. 1, Ch. 26, L. 1977.

89-8-106. When department may suspend action. The department may suspend action on applications not meet-

ing the definition of application in section 2 [89-8-104] of this act if it determines, after a public hearing conducted under the contested case procedures of the Montana Administrative Procedure Act, that the cumulative impact of those applications, if granted, would be contrary to the policies and purposes of this act. If the department suspends action on such applications, the provisions of section 8 [89-8-105] of this act apply.

History: En. 89-8-106 by Sec. 4, Ch. 116, L. 1974.

89-8-107. Reservations. The department may apply for reservations and shall, as rapidly as possible, assist other appropriate state agencies and political subdivisions in applying for reservations within the basin. The United States or any agency thereof may apply for reservation of water in the basin under section 89-890, R.C.M. 1947, for beneficial use of that water in the State of Montana. Particular emphasis shall be given to applications to reserve water for agricultural, municipal, and minimum flow purposes for the protection of existing rights and aquatic life.

History: En. 89-8-107 by Sec. 5, Ch. 116, L. 1974; amd. Sec. 10, Ch. 416, L. 1977.

89-8-108. Application of act. This act applies to applications currently pending with the department, as well as applications filed with the department after the effective date of this act.

History: En. 89-8-108 by Sec. 6, Ch. 116, L. 1974.

89-8-109. Utility facilities. This act does not apply to applications to appropriate water for use by a utility facility for which a certificate of environmental compati-

bility and public need is granted pursuant to the Montana Utility Siting Act of 1973.

History: En. 89-8-109 by Sec. 7, Ch. 116, L. 1974.

89-8-110. Certain changes of use allowed. Notwithstanding any provision of this act, the department may approve a change of purpose of use to agricultural, irrigation, domestic and municipal uses if it determines that the change is not contrary to the policies and purposes of this act.

History: En. 89-8-110 by Sec. 8, Ch. 116, L. 1974.

89-8-111. Severability. If a part of this [act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

History: En. 89-8-111 by Sec. 9, Ch. 116, L. 1974.

APPENDIX G

SENATE BILL 76, LAWS OF MONTANA (1979)

CHAPTER NO. 697

AN ACT TO ADJUDICATE CLAIMS OF EXISTING WATER RIGHTS IN MONTANA; AMENDING SECTIONS 3-5-111, 85-2-102, 85-2-112, 85-2-113, 85-2-114, 85-2-401, AND 85-2-406, MCA; REPEALING SECTIONS 85-2-201 THROUGH 85-2-210, MCA; AND PROVIDING AN EFFECTIVE DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. Purpose—district court water divisions—water judges—creation. (1) [This act] amends the Montana Water Use Act to expedite and facilitate the adjudication of existing water rights.

(2) To adjudicate existing water rights water divisions are established as defined in [section 2]. A water division shall be presided over by a water judge. [§ 3-7-101, MCA.]

(3) A water judge shall be designated within 30 days after [the effective date of this act] for each water division by a majority vote of a committee composed of the district judge from each single judge judicial district and the chief district judge from each multiple judge judicial district, wholly or partly within the division. A water judge must be a district judge of a judicial district wholly or partly within the water division. A district judge may not sit as a water judge in more than one division [§ 3-7-201 (1), MCA.]

(4) No water judge may preside over matters concerning the determination and interpretation of existing water rights beyond the boundaries specified in [section

2] for his division. [§ 3-7-501 (2), MCA; amd. Sec. 4, Ch. 80, L. 1981.]

(5) A water judge, when presiding over a water division, presides as district judge in and for each judicial district wholly or partly within the water divison. [§ 3-7-501 (3), MCA; amd. Sec. 4, Ch. 80, L. 1981.]

(6) The jurisdiction of each judicial district concerning the determination and interpretation of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly. [§ 3-7-501 (1), MCA.]

Section 2. Water divisions defined. (1) There are four water divisions whose boundaries are formed by the natural divides between drainages and the borders of the state of Montana and which are described as follows:

(a) The Yellowstone River Basin water division consists of those areas drained by the Yellowstone and Little Missouri Rivers and any remaining areas in Carter County.

(b) The lower Missouri River Basin water division consists of those areas drained by the Missouri River from below the mouth of the Marias River and any remaining areas in Glacier and Sheridan Counties.

(c) The upper Missouri River Basin water division consists of those areas drained by the Missouri River to below the mouth of the Marias River.

(d) The Clark Fork River Basin water division consists of the areas drained by the Clark Fork River, the Kootenai River, and any remaining areas in Lincoln County. [§ 3-7-102, MCA.]

(2) Whenever a question arises concerning which water judge shall preside over adjudication of a matter concerning the determination and interpretation of existing water rights, the question shall be settled by the water judges involved [§ 3-7-502, MCA.]

Section 3. Appointment of water masters—qualifications—removal. (1) The water judge in each water division shall appoint a water master.

(2) A water master may be appointed after July 1, 1980, and must be appointed on or before July 1, 1982.

(3) In appointing a water master, the water judge shall consider a potential master's experience with water law, water use, and water rights.

(4) A water master shall serve at the pleasure of the water judge and may be removed by the water judge. [§ 3-7-301, MCA; amd. Sec. 2, Ch. 268, L. 1981.]

Section 4. Salary, expenses, and retirement of water masters. (1) The water judges shall set a uniform salary for water masters. Water masters shall receive expenses as provided in 2-18-501 through 2-18-503.

(2) A water master shall participate in the Montana Public Employees' Retirement System established in Title 19, chapter 3.

(3) The salary and expenses of a water master shall be paid from the water right adjudication account established in [section 18]. [§ 85-2-241, MCA.]

Section 5. Duties of water masters. (1) The water master has the general powers given to a master by M. R. Civ. P., Rule 53 (c).

(2) Within a reasonable time after June 30, 1983, the water master shall issue a report to the water judge meeting the requirements for the preliminary decree as specified in [section 22]. [§ 85-2-231, MCA.]

(3) After a water judge issues a preliminary decree, the water master shall assist the water judge in the performance of the water division's further duties as ordered by the water judge. [§ 3-7-311, MCA.]

Section 6. Jurisdiction of the water divisions. (1) The action for the adjudication of all existing water rights under [this act] is commenced with the issuing of the order by the Montana supreme court to file a statement of a claim of an existing water right as provided in [section 16]. As to each claim, the action is considered filed in the judicial district of the county in which the diversion is made or, if there is a claimed right with no diversion, in the judicial district of the county in which the use occurs. [§ 85-2-2140, MCA.]

(2) The water judge for each division shall exercise jurisdiction over all matters concerning the determination and interpretation of existing water rights within his division as specified in [section 2] that are considered filed in or transferred to a judicial district wholly or partly within the division. [§ 3-7-501 (3), MCA; amd. Sec. 4, Ch. 80, L. 1981.]

(3) The water judge may consolidate all matters concerning the determination and interpretation of existing water rights within the water judge's division in any combination or groups of claims or matters for joint hear-

ings or proceedings conducted by the water judge or water master in any location within the division. The water judge may make such consolidations as are necessary to administer the requirements of [this act] in adjudicating claims of existing water rights. [§ 85-2-215, M.C.A.]

(4) All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in [section 16] [§ 85-2-212, MCA.]

(5) The water judge of each water division may appoint and supervise a water commissioner as provided for in Title 85, chapter. [§ 3-7-211, MCA.]

(6) The water judge of each water division may enforce the provisions of a final decree issued in that water division as provided in [section 24]. [§ 85-2-234, MCA.]

(7) The water judge may designate any other district judge within the water division to preside in his absence on his behalf as water judge for the immediate enforcement of an existing decree or the immediate granting of extraordinary relief as may be provided for by law upon an allegation of irreparable harm. [§ 3-7-213, MCA; amd. Sec. 3, Ch. 80, L. 1981.]

Section 7. Disqualification of water judges or water master. (1) A water judge may disqualify himself or the water master in any proceeding or pertinent portion

thereof in which his or the water master's impartiality might reasonably be questioned.

(2) A water judge may also disqualify himself or the water master in the following circumstances:

(a) if he or the water master has a personal bias or prejudice concerning a party of personal knowledge or disputed evidentiary facts concerning the proceeding;

(b) if in private practice he or the water master served as a lawyer in the matter in controversy or a lawyer with whom he or the water master previously practiced law served during such association as a lawyer concerning the matter or the judge or the lawyer has been a material witness concerning it;

(c) if he or the water master has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(d) if he or the water master knows that he or the water master individually or as a fiduciary, or his or the water master's spouse or minor child residing in his or the water master's household has a financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the outcome of the proceeding; or

(e) if he or the water master or his or the water master's spouse or a person within the third degree of relationship to any of them (as calculated according to 72-11-101 through 72-11-105) or the spouse of such a person:

(i) is a party to the proceeding or an officer, director, or trustee of a party;

(ii) is known by the judge or water master to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's or water master's knowledge likely to be a material witness in the proceeding.

(3) A water judge should inform himself about his and the water master's personal and fiduciary financial interests and make a reasonable effort to inform himself about the personal financial interests of his and the water master's spouse and minor children residing in his or the water master's respective household. [§ 3-7-402, MCA.]

(4) For the purposes of this section, the following definitions apply:

(a) "Proceeding" includes prehearing, hearing, appellate review, or other stages of adjudication conducted by the water master or water judge.

(b) "Fiduciary" includes such relationships as executor, administrator, trustee, or guardian.

(c) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a financial interest in such securities unless the judge or water master participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a financial interest in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company or a depositor in a mutual savings association or a similar proprietary interest is a financial interest in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and

(iv) ownership of government securities is a financial interest in the issuer only if the outcome of the proceeding could substantially affect the value of the securities. [§ 3-7-401, MCA.]

(5) A water judge may accept from the parties to the proceeding a waiver of any ground for disqualification if it is preceded by a full disclosure on the record of the basis for disqualification. [§ 3-7-403, MCA.]

(6) The procedure for disqualification of a water judge or water master specified in this section is exclusive unless otherwise specifically altered by the Montana supreme court. [§ 3-7-404, MCA.]

Section 8. Designation of water judge to fill vacancy. If a vacancy occurs, it shall be filled in the manner provided in [section 1] for the initial designation of a water judge. A vacancy is created when a water judge dies, retires, is not elected to a subsequent term, forfeits his judicial position, is removed, or is otherwise unable to complete his term as a district judge. [§ 3-7-203, MCA, amd. Sec. 2, Ch. 80, L. 1981.]

Section 9. Water judges—term of office. The term of office for water judges is from the date of initial appointment as provided in [section 1] to June 30, 1985. After June 30, 1985, the term of office of a water judge is 4 years, subject to continuation of the water divisions by the legislature. [§ 3-7-202, MCA.]

Section 10. Promulgation of rules and prescription of forms. As soon as practicable the Montana supreme court may promulgate special rules of practice and procedure and shall prescribe forms for use in connection with [this act] in consultation with the water judge and the department. [§ 3-7-103, MCA; amd. Sec. 16, Ch. 575, L. 1981.]

Section 11. Claim of existing water right—filing statement of claim required—exemptions. (1) A person claiming an existing right, unless exempted below or unless an earlier filing date is ordered as provided in [section 16], shall file with the department no later than June 30, 1983, a statement of claim for each water right asserted on a form provided by the department.

(2) The department shall file a copy of each statement of claim with the clerk of the district court for the judicial district in which the diversion is made or, if there is a claimed right with no diversion, the department shall file a copy of the statement of claim with the clerk of the district court of the judicial district in which the use occurs. [§ 85-2-221, MCA.]

(3) Claims for existing rights for livestock and individual as opposed to municipal domestic use based upon instream flow or groundwater sources and claims for rights in the Powder River Basin included in a declara-

tion filed pursuant to the order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing requirements of subsection (1) of this section. Such claims may, however, be voluntarily filed. [§ 85-2-222, MCA.]

Section 12. Department of fish and game to represent public recreational uses. The department of fish and game shall exclusively represent the public for purposes of establishing any prior and existing public recreational use in existing right determinations under [sections 11 through 26], provided that the foregoing shall not exclude a federal governmental entity from representing the public for the purpose of establishing any prior and existing public recreational use in existing right determinations under [sections 11 through 26] and further provided that the foregoing shall not be construed in any manner as a legislative determination of whether or not a recreational use sought to be established prior to July 1, 1973, is or was a beneficial use. [§ 85-2-223, MCA.]

Section 13. Statement of claim—contents. (1) The statement of claim for each right shall include substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water and times of use claimed;

(d) the legal description, with reasonable certainty, of the point or points of diversion and places of use of waters;

(e) the purpose of use, including, if for irrigation, the number of acres irrigated;

(f) the approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (e); and

(g) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief.

(2) The claimant shall submit maps, plats, aerial photographs, decrees, or pertinent portions thereof, or other evidence in support of his claim. All maps, plats, or aerial photographs should show as nearly as possible to scale the point of diversion, place of use, place of storage, and other pertinent conveyance facilities. [§ 85-2-224, MCA.]

Section 14. Abandonment by failure to file claim. The failure to file a claim of an existing right as required by [section 11] establishes a conclusive presumption of abandonment of that right. [§ 85-2-226, MCA.]

Section 15. Claim to constitute prima facie evidence. A claim of an existing right filed in accordance with [section 11] constitutes prima facie proof of its content until the issuance of a final decree. [§ 85-2-227, MCA.]

Section 16. Order to file claim. (1) The Montana supreme court shall within 10 days of the filing of the petition by the attorney general issue an order to file a statement of a claim of an existing water right in substantially the following form:

"WATER RIGHTS ORDER

FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED. (This introductory sentence shall be printed in not less than 12-point boldface type.) This order is notice of commencement of procedures for the general adjudication of existing rights to the use of water and of the requirement to file a claim for certain existing rights to the use of water. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency or the state of Montana, and federal agency of the United States of America on its own behalf or as trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the department no later than June 30, 1982. Claims for stock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources are exempt from this requirement; however, claims for such uses may be voluntarily filed. Claims filed with the department in the Powder River Basin in a declaration filed pursuant to the order of the department of natural resources and conservation or a district court issued pursuant to sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 425, Laws of 1975, are also exempt.

For further information, contact the department of natural resources and conservation, Helena, Montana, for a copy of the law and an explanation of it."

(2) Upon petition of the attorney general, the Montana supreme court shall issue the order called for in subsection (1) with a shorter claim filing period of not less than 1 year, subject to extension not beyond June 30, 1983, by the Montana supreme court upon petition of the attorney general, in those basins or subbasins where state adjudication jurisdiction is being or is likely to be challenged. [§ 85-2-212, MCA.]

Section 17. How notice of the order to be given. To assure that all persons who may claim an existing water right are notified of the requirement to file a claim of that right, the Montana supreme court shall give notice of the order as follows:

(1) It shall cause the order printed in not less than 10-point type to be placed in a prominent and conspicuous place in all daily newspapers of the state and in at least one newspaper published in each county of the state within 30 days after the Montana supreme court order as provided in [section 16] and in April of 1980, 1981, 1982, and 1983.

(2) It shall cause the order in writing to be placed in a prominent and conspicuous location in each county courthouse in the state within 30 days after the Montana supreme court order as provided in [section 16].

(3) It shall provide a sufficient number of copies of the order to the county treasurers before October 15, 1979, 1980, 1981, and 1982, and the county treasurers shall enclose a copy of the order with each statement of property taxes mailed in 1979, 1980, 1981, and 1982. In the implementation of this subsection, the department shall provide reimbursement to each county treasurer for the

reasonable additional costs incurred by the treasurer arising from the inclusion of the order required by this section. The department shall be reimbursed for such costs from the water right adjudication account created by [section 18].

(4) It shall provide copies of the order in writing to the press services with offices located in Helena within 30 days after the Montana supreme court order as provided in [section 16], and in April of 1980, 1981, 1982, and 1983.

(5) It shall, under authority granted to the states by 43 U.S.C. 666, provide for service of the petition and order upon the United States attorney general or his designated representative.

(6) It may also in its discretion give notice of the order in any other manner that will carry out the purposes of this section.

(7) It may also in its discretion order that the department or the water judge assist the Montana supreme court in the carrying out of this section. [§ 85-2-213, MCA.]

Section 18. Fees—special account created. (1) Each claim filed under [section 11] shall be accompanied by a filing fee in the amount of $40, subject to the following exceptions:

(a) the total filing fees for all claims filed by one person in any one water court division may not exceed $480; and

(b) no filing fee is required accompanying a claim of an existing right that is included in a decree of a court

in the state of Montana and which is accompanied by a certified copy of that decree or pertinent portion thereof or verified as otherwise ordered by the court. [§ 85-2-225, MCA; amd. Sec. 1, Ch. 253, L. 1981.]

(2) There is established a water right adjudication account in the ear-marked revenue fund of the state treasury. All fees collected under this section and [section 22] shall be deposited in the account to pay the expenses incurred by the state for administering [this act]. [§ 85-2-241, MCA.]

Section 19. Expenses to be borne by state. All expenses incurred by the state as a result of [this act] are to be paid from the water right adjudication account in the earmarked revenue fund established in [section 18].

Expenses include but are not limited to the salaries and expenses of personnel, equipment, office space, and other necessities incurred in administering [this act]. If sufficient revenue is not available from the earmarked revenue fund, the expense shall be paid from the state's general fund. [§ 85-2-242, MCA.]

Section 20. Adjudication of existing rights. (1) Within 20 days after [the effective date of this act], the state of Montana upon relation of the attorney general shall petition the Montana supreme court to require all persons claiming a right within a water division to file a claim of the right as provided in [section 11]. [§ 85-2-211, MCA.]

(2) The water judge shall monitor the claim filing procedure for claims within his water division and make

any orders necessary to assure timely and accurate compliance with the claim filing procedure. [§ 85-2-214 (2), MCA.]

Section 21. Department assistance to water judges. The department, subject to the direction of the water judge, shall, without cost to the judicial districts wholly or partly within his water division:

(1) provide such information and assistance as may be required by the water judge to adjudicate claims of existing rights;

(2) establish information and assistance programs to aid claimants in the filing of claims for existing rights required by [section 11];

(3) conduct field investigations of claims that the water judge in consultation with the department determines warrant investigation; and

(4) provide the water judge with all information in its possession bearing upon existing rights, including all declarations filed with and all information gathered by the department with respect to existing rights in the Powder River Basin. [§ 85-2-243, MCA.]

Section 22. Preliminary decree. (1) Within a reasonable time after the close of the filing period, the water judge shall issue a preliminary decree. The preliminary decree shall be based on the statements of claim before the water judge, the data submitted by the department, and any additional data obtained by the water judge.

(2) The preliminary decree shall contain the information and make the determinations, findings, and conclusions required for the final decree under [section 24].

(3) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary decree set forth in subsections (1) and (2), and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not so satisfied, he may, at his option, recommit the report to the master with instructions, or modify the report and issue the preliminary decree. [§ 85-2-231, MCA; amd. Sec. 6, Ch. 268, L. 1981.]

(4) The water judge shall send a copy of the preliminary decree to the department, and the water judge shall serve by mail a notice of availability of the preliminary decree to each person who has filed a claim of existing right, or, in the Powder River Basin, to each person who has filed a declaration of an existing right. The water judge shall enclose with the notice an abstract of the disposition of such person's claimed or declared existing right. The notice of availability shall also be served upon those issued or having applied for and not having been denied a beneficial water use permit pursuant to Title 85, chapter 2, part 3, those granted a reservation pursuant to 85-2-316, or other interested persons who request service of the notice from the water judge. The clerk or person designated by the water judge to mail the notice shall make a general certificate of mailing certifying that a copy of the notice has been placed in the United States mail, postage prepaid, addressed to each party required to be served notice of the preliminary decree. Such certificate shall be conclusive evidence of due and legal notice of entry of decree.

(5) Any person may obtain a copy of the preliminary decree upon payment of a fee of $20 or the cost of

printing, which ever is greater, to the water judge. [§ 85-2-232, MCA.]

Section 23. Hearing on preliminary decree. (1) Upon objection to the preliminary decree by the department, a person named in the preliminary decree, or any other person, for good cause shown, the department or such person is entitled to a hearing thereon before the water judge.

(2) If a hearing is requested, such request must be filed with the water judge within 90 days after notice of entry of the preliminary decree. The water judge may, for good cause shown, extend this time limit an additional 30 days if application for the extension is made within 90 days after notice of entry of the preliminary decree.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for

other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e). [§ 85-2-233, MCA; amd. Sec. 7, Ch. 268, L. 1981.]

Section 24. Final decree. (1) The water judge shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying the preliminary decree. If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the water judge shall enter it as the final decree.

(2) The final decree shall establish the existing rights and priorities within the water judge's jurisdiction of persons required by [section 11] to file a claim for an existing right and of persons required to file a declaration of existing rights in the Powder River Basin pursuant to an order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973.

(3) The final decree shall state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person named in the decree are based.

(4) For each person who is found to have an existing right, the final decree shall state:

(a) the name and post-office address of the owner of the right;

(b) the amount of water, rate, and volume, included in the right;

(c) the date of priority of the right;

(d) the purpose for which the water included in the right is used;

(e) the place of use and a description of the land, if any, to which the right is appurtenant;

(f) the source of the water included in the right;

(g) the place and means of diversion;

(h) the inclusive dates during which the water is used each year;

(i) any other information necessary to fully define the nature and extent of the right. [§ 85-2-234, MCA.]

Section 25. Appeals from final decree. A person whose existing rights and priorities are determined in the final decree may appeal the determination only if:

(1) he requested a hearing and appeared and entered objections to the preliminary decree; or

(2) his rights as determined in the preliminary decree were altered as the result of a hearing requested by another person. [§ 85-2-235, MCA.]

Section 26. Certificate of water right. When a final decree is entered, the water judge shall send a copy to the department. The department shall on the basis of the final decree issue a certificate of water right to each person decreed an existing right. The original of the certificate shall be sent to the county clerk and recorder of the county where the point of diversion or place of use is located for recordation. The department shall keep a copy of the certificate in its office in Helena. After re-

cordation, the clerk and recorder shall send the certificate to the person to whom the right is decreed. [§ 85-2-236, MCA.]

Section 27. Legislative intent regarding Indian water rights—suspension of adjudication—negotiation of compacts authorized—procedure—negotiation of federal rights. (1) Because the water and water rights within each water division are interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. Therefore, it is the intent of the legislature that the attorney general's petition required in [section 16] include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666. However, it is further intended that the state of Montana proceed under the provisions of this section in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state. [§ 85-2-701, MCA.]

(2) From the time of filing the petition required in [section 16] until July 1, 1982, and while negotiations for the conclusion of a compact under this section are being pursued, all actions to generally adjudicate reserved Indian water rights from a source of water in question under [this act] are suspended, unless an action is commenced or is pending by or on behalf of an Indian tribe to adjudicate water from that source other than as provided for in Title 85, chapter 2. In such case, the suspension is maintained only if the action is dismissed or if the parties to the action

stipulate to the suspension during compact negotiations of all further proceedings in the action except the determination of jurisdictional issues and an order is so issued. [§ 85-2-217, MCA; amd. Sec. 4, Ch. 268, L. 1981.]

(3) The compact commission may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under subsection (1). Compact proceedings shall be commenced by the commission. The commission shall serve by certified mail directed to the governing body of each tribe a written request for the initiation of negotiations under [this act] and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Upon receipt of such written designation from the governing body of a tribe, compact negotiations shall be considered to have commenced. When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana, any affected tribal governing body, and the congress of the United States. The water judge shall include in the preliminary decree the contents of a compact that has been agreed upon by the parties to the compact whether or not it has been ratified by congress. [§ 85-2-702, MCA; amd. Sec. 8, Ch. 268, L. 1981.]

(4) (a) There is created a reserved water rights compact commission. Commissioners are appointed within 30 days of [the effective date of this act] as follows:

(i) two members of the house of representatives appointed by the speaker, each from a different political party;

(ii) two members of the senate appointed by the president, each from a different political party;

(iii) four members designated by the governor; and

(iv) one member designated by the attorney general.

(b) Legislative members of the commission are entitled to receive compensation and expenses as provided in 5-2-301 for each day actually spent on commission business. Other members are entitled to salary and expenses as state employees.

(c) The commission is attached to the governor's office for administrative purposes only. The costs of the commission shall be paid from funds appropriated for that purpose from the water right adjudication account established in [section 19].

(d) Members appointed to the commission shall serve until the work of the commission is completed or until they resign or are otherwise unable to serve. A vacancy must be filled in the manner of the original appointment. [§ 2-15-212, MCA.]

(5) The commission or any other party to the negotiations may terminate negotiations by providing notice to all parties 30 days in advance of the termination date. On the termination date, the suspension of the application of [this act] provided for in subsection (2) shall also terminate. [§ 85-2-704, MCA; amd. Sec. 9, Ch. 268, L. 1981.]

(6) The compact commission may also enter into separate negotiations with the federal government for the

conclusion of compacts concerning the equitable division and apportionment of water between the state and its people and the federal government claiming non-Indian reserved waters within the state. The terms and conditions of such negotiations shall be the same as provided in this section for negotiations with Indian tribes. [§ 85-2-703, MCA.]

Section 28. Section 3-5-111, MCA, is amended to read:

"3-5-111. District courts presided over by judges of other districts. A judge of the district court of any judicial district may hold the district court in any county of another district than his own at the request of the judge thereof *or as otherwise provided by law*. Upon the request of the governor, it is his duty to do so. In either case the judge holding the court has the same power either in court or chambers as a judge thereof."

Section 29. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a public agency, to reserve water in accordance with 85-2-316.

(2) "Beneficial use" means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. A use of water for slurry to export coal from Montana is not a beneficial use. Slurry is a mixture of water and insoluble matter.

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(6) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(7) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

(8) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

(9) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(10) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

(11) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

(12) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(13) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including geothermal water and diffuse surface water.

(14) "Water division" means a drainage basin as defined in [section 2].

(15) "Water judge" means a judge as provided for in [sections 1 through 10].

(16) "Water master" means a master as provided for in [sections 1 through 10].

(17) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 30. Section 85-2-112, MCA, is amended to read:

"85-2-112. Department duties. The department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113;

(2) prescribe procedures, forms, and requirements for applications, permits, certificates, declarations, claims of existing rights, and proceedings under this chapter and prescribe the information to be contained in any application, declaration, claim of existing right, or other docu-

ment to be filed with the department under this chapter not inconsistent with the requirements of this chapter;

(3) establish and keep in its Helena office a centralized record system of all existing rights and a public record of permits, certificates, declarations, claims of existing rights, applications, and other documents filed in its office under this chapter;

(4) cooperate with, assist, advise, and coordinate plans and activities with the federal, state, and local agencies in matters relating to this chapter;

(5) upon request by any person, cooperate with, assist, and advise that person in matters pertaining to measuring water or filing declarations with the department or claims of existing rights with a district court under this chapter."

Section 31. Section 85-2-113, MCA, is amended to read:

"85-2-113. Board powers and duties. (1) The board may prescribe fees or service charges for any public services rendered by the department under this chapter, including fees for the filing of applications or for the issuance of permits and certificates. There shall be no fees for the filing of declarations or for any action taken by the department at the request of the water judge or for the issuance of certificates of existing rights.

(2) The board may adopt rules necessary to implement and carry out the purposes and provisions of this chapter. These rules may include but are not limited to rules to:

(a) govern the issuance and terms of interim permits authorizing an applicant for a regular permit under this chapter to begin appropriating water immediately, pending final approval or denial by the department of the application for a regular permit;

(b) require the owner or operator of appropriation facilities to install and maintain suitable controlling and measuring devices;

(c) require the owner or operator of appropriation facilities to report to the department the readings of measuring devices at reasonable intervals and to file reports on appropriations; and

(d) regulate the construction, use, and sealing of wells to prevent the waste, contamination, or pollution of groundwater.

(3) The board shall adopt rules providing for and governing temporary emergency appropriations, without prior application for a permit, necessary to protect lives or property."

Section 32. Section 85-2-114, MCA, is amended to read:

"85-2-114. Prevention of waste. (1) If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, or preventing water from moving to another person having a prior right to use the same, it may petition the district court supervising the distribution of water among appropriators from the source to:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlaw-

ful use of water or to secure water to a person having a prior right to its use; or

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take such steps as may be necessary to remedy the waste, unlawful use, or interference.

(2) The department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it, which notice shall be legal notice to all persons interested in the appropriation or distribution of the water.

(3) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin such waste, unlawful use, or interference."

Section 33. Section 85-2-401, MCA, is amended to read:

"85-2-401. Priority. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, 85-2-310 (3), and 85-2-313.

(3) Priority of appropriation perfected before July 1, 1973, shall be determined as provided in *part 2 of this chapter.*"

Section 34. Section 85-2-406, MCA, is amended to read:

"85-2-406. District court supervision of water distribution. (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision shall be governed by the principle that first in time is first in right.

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to *part 2 of this chapter*, any party to the controversy may petition the district court for relief. The district court from which relief is sought may grant such injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo pending the *issuance of the final decree.*

(3) A controversy between appropriators from a source which has been the subject of a general determination of existing rights under *part 2 of this chapter* shall be settled by the district court which issued the final decree. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree. In cases involving permits issued by the department, the court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. The order settling the controversy shall be

appended to the final decree, and a copy shall be filed with the department. The department shall be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding."

Section 35. Codification. (1) Sections 1 through 10 of this act are intended to be codified as an integral part of Title 3, and the provisions contained in Title 3 apply to this act.

(2) Sections 11 through 27 are intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions contained in Title 85, chapter 2, apply to this act.

(3) If the provisions of this act are not codified as stated above, the code commissioner shall add to the MCA, if necessary, statutory language to convey the intent of this section.

Section 36. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 37. Repealer. Sections 85-2-201 through 85-2-210, MCA, are repealed.

Section 38. Effective date. This act is effective on passage and approval.

Approved May 11, 1979.

APPENDIX B

United States' Petition to the Montana Supreme Court and Orders of the Montana Supreme Court attached as exhibits:

IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. 14833

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA FOR A STAY OF PROCEEDINGS UNDER THE MONTANA WATER USE ACT OR IN THE ALTERNATIVE AN ORDER ENLARGING THE TIME FOR FILING STATEMENTS OF CLAIMS TO THE USE OF WATER IN MONTANA

[Filed April 19, 1982]

This matter comes before this Court on the United States' petition for a stay of the proceeding under the Montana Water Use Act, MCA 85-2-101, *et seq.*, or in the alternative an enlargement of time within which to file statements of claims to the use of water within the State of Montana, to and including June 30, 1983. The United States supports its petition for the following reasons.

I

Introduction

In 1975 and 1979, six lawsuits were filed by the United States in the United States District Court for the District

of Montana to adjudicate, *inter alia*, the water rights held by the United States for its own use and for the benefit of certain Indian tribes and their members in the waters of streams traversing or adjacent to federal lands and Indian reservations.[1] These cases sought to adjudicate the rights of other users, *inter sese*, as well. See, *Northern Cheyenne Tribe v. Tongue River Water Users' Association, et al.*, 484 F. Supp. 31 (D. Mont. 1979). The State of Montana and other parties filed motions to dismiss and in 1979, the federal district court dismissed the actions filed by the United States. *Id.*

On February 22, 1982 the United States Court of Appeals for the Ninth Circuit reversed the district court, holding that the State of Montana was without jurisdiction to adjudicate Indian water rights. See, *Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, et al. v. Adsit*, 668 F. 2d 1080 (9th Cir. 1982). A copy of that Opinion is attached hereto. Recently, the State of Montana declared its intention to petition the United States Supreme Court to review the Ninth Circuit decision.

---

1 There were two suits filed in 1975, *United States v. Tongue River Water Users' Association, et al.*, No. CV-75-20-BLG, (App. No. 80-3042) and *United States v. Big Horn Low Line Canal Co., et al.*, No. CV-75-34-BLG, (App. No. 80-3063). The remaining suits were filed in 1979, *United States v. Aasheim, et al.*, No. CV-79-40-GF, (App. No. 80-3061); *United States v. Aageson, et al.*, No. CV-79-21-GF, (App. No. 80-3044); *United States v. AMS Ranch, et al.*, No. CV-22-GF, (App. No. 80-3045); and *United States v. Abell, et al.*, No. CV-79-33-M, (App. No. 80-3080). The only Indian tribe that has formally brought suit in federal court to adjudicate the waters within its borders is the Northern Cheyenne Tribe. See, *Northern Cheyenne v. Tongue River Water Users' Association*, No. CV-75-6-BLG. The case was consolidated when the United States brought its action on behalf [sic] the Northern Cheyenne and Crow Tribes.

Approximately six months prior to the district court's decision to dismiss the United States' claims in *Northern Cheyenne, supra*, the State of Montana amended its Water Use Act. See, Montana Water Use Act, MCA 85-2-101, *et seq.* (as amended 1979) (hereinafter the "Act"). Under the Act, "the action for adjudication of . . . water rights" in the state is commenced by order of this Court requiring water rights claimants to file their statements of claims for the use of water within the State of Montana not later than June 30, 1983. *Id.*, Section 16(1), MCA 85-2-212(a). "Upon petition of the State Attorney General . . . a shorter claim filing period of not less than one year" can be named. *Id.*, Section 16(2), MCA 85-2-212(2). On June 8, 1979, this Court ordered claims to be filed by January 1, 1982. A copy of that Order is attached hereto as Exhibit A. On December 7, 1981, this Court issued an Order extending the January 1, 1982 date until April 30, 1982. A copy of that Order is attached as Exhibit B.

II

Argument

A. With the issuance of the *Adsit* decision, *supra*, state authority to adjudicate Indian reserved water rights in Montana has been rejected. While this Court is bound by lower federal court decisions interpreting federal law, see, *State v. City Council of the City of Butte, Montana*, 145 Mont. 316, 400 P. 2d 629 (1965); *State ex rel. Burlington Northern, Inc. v. District Court*, 169 Mont. 480, 548 P. 2d 1390 (1976); and *Audit Services, Inc. v. Stewart and Jones, Inc.*, 188 Mont. 41, 622 P. 2d 217 (1981), we submit that the issue of state jurisdiction will not be fi-

nally settled until the United States Supreme Court either denies *certiorari* or accepts the case and rules on the issue of jurisdiction. If the decision stands, we submit that it will prevent this Court from fully adjudicating all water rights initially made subject of this adjudication, see, Montana Water Use Act, MCA 85-2-101, *et seq.*[2] and may render the proceeding useless.[3]

The United States respectfully submits that the prudent course of action would be for this Court to stay all proceedings under the Montana Water Use Act until state jurisdiction can be resolved. This would entail deleting the deadline of April 30, 1982 for filing statements of claims for the use of water within the State of Montana and postpone said requirement pending the proceedings in *Northern Cheyenne Tribe, et al. v. Adsit, supra,* in the United States Supreme Court.

B. In the alternative, the United States respectfully requests this Court to exercise its authority under Section 16(2) of the Montana Water Use Act, MCA 85-2-212 (2), to extend the deadline for filing claims to June 30,

---

2 The stated purpose of the Montana Water Use Act to develop and complete a "comprehensive state water plan" would not reach fruition if federal and Indian claims were not adjudicated along with those claims made by the citizens of this State.

3 Any decree issued which did not include both state and federal claims would always by [sic] subject to challenge by those who did not participate in the adjudication.

1983 or until 60 days after the issue in *Adsit* is decided, whichever is first.

Respectfully submitted this 14th day of April, 1982.

/s/ F. Patrick Barry
Attorney, Department of Justice
Land and Natural Resources Division
10th & Pennsylvania Avenue, N. W.
Washington, D. C. 20530
(202) 633-2045

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 14833

IN THE MATTER OF THE PETITION OF THE STATE OF MONTANA FOR AN ORDER REQUIRING THE FILING OF STATEMENTS OF CLAIM TO THE USE OF WATER IN MONTANA.

WATER RIGHTS ORDER

[Filed June 8, 1979]

PER CURIAM:

A petition having been filed by the Attorney General of the State of Montana pursuant to Chapter 697, Laws of 1979, requesting, among other things, that this Court issue an order as provided therein within 10 days of the filing of his petition,

IT IS NOW ORDERED as follows pursuant to section 16, Chapter 697, Laws of 1979:

FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED. (This introductory sentence shall be printed in not less than 12-point boldface type.) This order is notice of commencement of procedures for the general adjudication of exist-

ing rights to the use of water and of the requirement to file a claim for certain existing rights to the use of water. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency or the state of Montana, and federal agency of the United States of America on its own behalf or as trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the Department of Natural Resources and Conservation of the State of Montana no later than January 1, 1982. Claims for stock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources are exempt from this requirement; however, claims for such uses may be voluntarily filed. Claims filed with the department in the Powder River Basin in a declaration filed pursuant to the order of the Department of Natural Resources and Conservation or a district court issued pursuant to sections 3 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are also exempt.

For further information, contact the Department of Natural Resources and Conservation, Helena, Montana, for a copy of the law and an explanation of it.

DATED this 8th day of June, 1979.

/s/ Frank I. Haswell
Chief Justice
/s/ John C. Sheehy
/s/ John Conway Harrison
/s/ Daniel J. Shea
/s/ Gene B. Daly
Justices

EXHIBIT B

IN THE SUPREME COURT OF
THE STATE OF MONTANA

No. 14833

IN THE MATTER OF THE PETITION
OF THE ATTORNEY GENERAL FOR AN
ORDER REQUIRING THE FILING OF
STATEMENTS OF CLAIMS TO THE USE
OF WATER IN MONTANA

ORDER

[Filed December 7, 1981]

PER CURIAM:

Pursuant to the authority invested in us by Chapter 485, Session Laws of 1975, and following a hearing in the above-entitled matter,

IT IS ORDERED:

(1) The final date for filing statements of claims to existing rights to the use of water in this State arising prior to July 1, 1973, is hereby extended to Friday, April 30, 1982, at 5:00 p.m.

(2) No further extensions for filing statements of claims to such existing water rights will be granted.

(3) This order shall not apply to statements of claims to existing rights to the use of water arising prior to July 1, 1973, in the Powder River Basin of Montana.

(4) A formal written opinion of this Court will follow this order at a later time.

(5) The Clerk is directed to mail a true copy of this order to all persons who have filed written statements herein in connection with the petition of the Attorney General for extension of time or who have appeared at the hearing thereon.

(6) The Department of Natural Resources and Conservation shall cause a copy of this order, printed in not less than 10 point type, to be placed in a prominent and conspicuous place once each week for three successive weeks in all daily newspapers in the State of Montana, and in one weekly newspaper published in each county of the State within 30 days of the date hereof.

(7) The Department of Natural Resources and Conservation shall cause a copy of this order to be placed in a prominent and conspicuous place in each county courthouse in this State within 30 days of the date hereof.

(8) The Department of Natural Resources and Conservation shall provide copies of this order to the press services with offices located in Helena, Montana, within 30 days of the date hereof.

(9) The Attorney General shall, under the authority granted by 43 U.S.C. 666, provide for service of the

order upon the United States Attorney General or his designated representative.

DATED this 7th day of December, 1981.

/s/ **Frank I. Haswell**
Chief Justice
/s/ **Gene B. Daly**
/s/ **John Conway Harrison**
/s/ **Daniel J. Shea**
/s/ **John C. Sheehy**
/s/ **Frank B. Morrison, Jr.**
/s/ **Fred J. Weber**
Justices

APPENDIX 1

IN THE SUPREME COURT OF
THE STATE OF MONTANA

No. 14833

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA FOR A STAY OF PROCEEDINGS UNDER THE MONTANA WATER USE ACT OR IN THE ALTERNATIVE AN ORDER ENLARGING THE TIME FOR FILING STATEMENTS OF CLAIMS TO THE USE OF WATER IN MONTANA

ORDER

[Filed April 27, 1982]

PER CURIAM:

The United States of America has petitioned for a stay of proceedings under the Montana Water Use Act or in the alternative an enlargement of time within which to file statements of claims to the use of water within the State of Montana, to and including June 30, 1983. The Department of Natural Resources and Conservation of the State of Montana, the Attorney General of Montana and the Chief Water Judge have filed responses thereto. The Court has examined and considered the same, together with all legal memoranda.

IT IS NOW ORDERED:

1. The petition of the United States of America is denied.

2. The grounds of denial are:

(1) There has been no showing of a need for extension of the filing deadline. Indian water rights can be fully protected in the State court system under existing procedures. The pendency of federal litigation does not affect the State of Montana in proceeding to adjudicate non-Indian claims.

(2) The power to petition for extension of the filing deadline under section 85-2-212(2), MCA, must be on petition of the Attorney General and the Attorney General objects to the extension in this instance.

(3) To grant the extension would disrupt the legislative plan that has been in the process of implementation since 1979.

For these and other reasons not necessary to be expressed or discussed in this order, the petition of the United States for further extension of time is denied in all respects.

DATED this 27th day of April, 1982.

/s/ Frank I. Haswell
Chief Justice
/s/ Gene B. Daly
/s/ John Conway Harrison
/s/ Daniel J. Shea
/s/ John C. Sheehy
/s/ Frank B. Morrison, Jr.
/s/ Fred J. Weber
Justices

APPENDIX J

S. Rep. No. 755, 82nd Cong., 1st Sess. (1951)
Mr. McCarran, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany S. 18]

The Committee on the Judiciary, to which was referred the bill (S.18) to authorize suits against the United States to adjudicate and administer water rights, having considered the same, reports favorably thereon, with amendments, and recommends that the bill as amended, do pass.

Amendments

1. On page 1, strike out all that follows the colon in line 10 down to and including line 1, on page 2, and insert in lieu thereof the following:

Provided, That nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. When the United States shall be a party to any such suit it shall be deemed to have waived any right to plead that the State laws are not applicable, or that the United States is not amenable thereto, by reason of the sovereignty of the United States, and the United States shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*,

2. At the end of the bill add the following new section:

Sec. 2. The head of every department or agency of the United States and of every corporation which is wholly owned by the United States shall, within two years from the effective date of this Act, cause to be filed with the Secretary of the Interior, in such form and detail as he shall prescribe, a complete list of all claims of right to the use by that department, agency, or corporation of the waters of any stream or other body of surface water in the United States for agricultural, silvicultural, horticultural, stock-water, municipal, domestic, industrial, mining, or military purposes, or the protection, cultivation, and propagation of fish and wildlife, or any other purpose involving a consumptive use of water, or for the production of hydroelectric or other power or energy. Said list shall be supplemented and revised promptly as new claims of right are made and existing claims are abandoned or otherwise disposed of. A catalogue of such claims shall be maintained by the Secretary and, except for items therein which are certified by the head of the claimant department, agency, or corporation to be of such importance to the national defense as to require secrecy, shall be open to inspection by the public and, subject to the same exception, copies thereof and of items therein shall be furnished by the Secretary upon payment of the cost thereof. The Secretary may make rules and regulations to carry out the purpose of this section.

Purpose

The purpose of the proposed legislation, as amended, is to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of ac-

quiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit.

Statement

Hearings were held on S. 18, and the committee is of the opinion that in order to understand the background of this legislation a resume of some of the history and decisions relating to the law of water rights would be of help.

The committee has taken note of the reports of the Department of Justice and the Department of the Interior printed below which oppose the legislation, but has concluded, after a consideration of all of the evidence available to the committee, that the legislation is meritorious.

There are two established doctrines relating to the law of water rights as it is applied in the United States today. The first is the riparian doctrine, which was inherited from England, and the second is the prior appropriation doctrine, which is founded in the customs and practices of the settlers and is uniformly recognized in the law of most of the western states.

The reason that there have been two doctrines lies in the volume of water which is available to particular sections of the country. The riparian doctrine generally has currency in localities where water is plentiful, and the prior appropriation doctrine is adhered to in those areas where water is at a premium. Under the riparian doctrine, the owner of land contigous to a stream has certain rights in the flow of the water by reason of his ownership of land. Under the doctrine of prior appropriation the first user of the water acquires a priority right

to continue the use, and the contiguity of land to the watercourse is not a factor. It can readily be seen that the western states are the ones which are susceptible to the doctrine of prior appropriation.

It will follow that the adjudication of water rights which might involve the United States would in most instances be confined to those states in which the doctrine of prior appropriation is applicable.

The doctrine of prior appropriation had its inception in the Western States early in the settlement of the West, being brought about by the arid and semi-arid character of such States. The doctrine that "first in time is first in right" to the beneficial use of the water in the streams of such States first became the law of appropriation by custom and was later sanctioned by constitutional and legislative enactment in 11 of the Western States. Under the law sanctioning the doctrine of "first in time is first in right," vast quantities of land in these States, beginning back in the territorial days, was brought under cultivation through the courage and hard work of those who homesteaded or otherwise secured farm and ranch lands and made appropriations of water with which to make such lands productive. Litigation with respect to the water rights developed early in the history of the right to the use of water by appropriation. Down through the years the courts of the respective States marked out the pathway whereby order was instituted in lieu of chaos. Rights were established, and all of this at the expense, trial, and labor of the pioneers of the West, without material aid from our United States Government until a much later time when irrigation projects were initiated by Congress through the Department of the Interior and

later the Bureau of Reclamation. Even then Congress was most careful not to upset, in any way, the irrigation and water laws of the Western States. In 1902 Congress wrote into the Federal Reclamation Act a strict admonition to the Secretary of the Interior. Section 8 of that act, being now section 383, title 43, United States Code, is in effect as follows:

> Vested rights and State laws unaffected.—Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secrtary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof.

It will be seen that in the Western States irrigation of the lands is essential to successful farming and ranching and failure by a landowner to receive the amount of water vested or adjudicated to him is likely to be fatal to his economic welfare.

In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.

In 1877 the Congress, in the Desert Land Act of 1877 (19 Stat. L. 377, Ch. 107), severed the water from the land,

and the effect of such statute was thereafter that the land should be patented by the United States separate and apart from the water and that all the nonnavigable water should be reserved for the use of the public under the laws of the States and Territories named in the act. This statute was construed by the Supreme Court of the United States in *California-Oregon Power Co. v. Beaver Portland Cement Co.* (295 U. S. 142), in which the Court, inter alia, held:

> 1. Following the Desert Land Act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since created out of territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect to riparian rights should obtain.
>
> 2. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the State of their location.
>
> 3. The effect of the statute was to sever all waters upon the public domain, not theretofore appropriated, from the land itself, and that a patent issued thereafter for lands in a desert-land State or Territory, under any of the land laws of the United States, carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed.

In the course of its opinion the Court said:

> The fair construction of the provision now under review is that Congress intended to establish the rule

that for the future the land should be patented seperately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the States and Territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced.

The Court further stated:

Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the States affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since created out of the Territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. For since Congress cannot enforce either rule upon any state, *Kansas v. Colorado* (206 U. S. 46, 94), the full power of choice must remain with the State.

It is interesting to note what the Court said in a marginal note on page 164 of the opinion:

In this connection it is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of State law in respect to the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards.

The effect and authority of the foregoing cited case was later followed by the Supreme Court in *Ickes v. Fox* (300 U.S. 82), decided February 1, 1937, wherein the Court said, at page 95.

> The Federal Government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the Government title to a parcel of land was not to carry with it a water right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land States. *California Power Co. v. Beaver Cement Co.* (295 U.S. 142, 162). And in those States, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by State law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.

It is therefore settled that in the arid Western States the law of appropriation is the law governing the right to acquire, use, administer and protect the public waters as provided in each such State.

It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter

to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

The committee believes that such a situation cannot help but result in a chaotic condition. Each water user under some State laws is required to pay a graduated fee or tax annually for the services of water commissioners. The commissioners must apportion the water to the decreed users thereof in accordance with their de-

creed rights, and are required to deny the use of water to any user who at a particular time is not in the priority for the available supply of water. Failure to comply with the lawful orders of the water commissioner subjects the offender to the administrative and penal orders of the court, usually issued in contempt proceedings. If a water user possessing a decreed water right is immune from suits and proceedings in the courts for the enforcement of valid decrees, then the years of building the water laws of the Western States in the earnest endeavor of their proponents to effect honest, fair and equitable division of the public waters will be seriously jeopardized.

If such a condition is to continue in the future it will result in a throw-back to the conditions that brought about the enactment of the statutory water laws, i.e., the necessity that the public waters so necessary to the economic welfare of the arid States be allotted in an equitable manner as possible to all users of the available supply thereof. It is said of such laws by the Supreme Court in the case of *Pacific Live Stock Co. v. Oregon Water Board* (241 U. S. 447):

> • • • All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertain-

ties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

The committee is aware of the fact, as shown by the hearings, that the United States Government has acquired many lands and water rights in States that have the doctrine of prior appropriation. When these lands and water rights were acquired from the individuals the Government obtained no better rights than had the persons from whom the rights were obtained.

Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

It will be noted that the amendment to S. 18 provides that nothing in the act shall authorize the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. This is done in order not to open up any controversies between the States as to water rights on an interstate stream by permitting the United States to be made a party thereto.

The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decisions of the Court in the same manner as if it were a private individual.

Senator Magnuson raised the question as to whether S. 18 could be used for the purpose of delaying or block-

ing a multiple-purpose development such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin or other similar projects, stating that there was a possibility of an individual or group having water rights on that stream bringing suits to adjudicate their respective rights and therefore preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. The committee, for the legislative history of this bill, definitely desires to repudiate any such intent which may be deduced from S. 18 and states that this is not the purpose and the intent of this legislation. Where reclamation projects have been authorized for the benefit of the water users and the public generally, they should proceed under the law as it exists at the present time and should the Government have reason to need the water of any particular user on a stream, that water should be obtained by condemnation proceedings as is already provided for by law. The committee can think of no particular reason why the more development of a project should be delayed or stopped by the passage of S. 18 and it is not so intended. An exchange of letters by Senator Magnuson and Senator McCarran dealing with this feature of the bill is hereto attached and made a part of this report.

Senator Magnuson also submitted an amendment to the bill which appears as section 2 of the bill. It requires the head of each department or agency of the United States and every corporation which is wholly owned by the United States to submit within a 2-year period of time to the Secretary of the Interior a complete list of all claims of right to use any stream or body of surface water in the United States. This list shall be supplemented properly

as new claims and rights are made or other claims are abandoned or otherwise disposed of. A catalog of such claims is to be maintained by the Secretary, which shall be open to the public inspection, except when they may be barred from such inspection by reason of secrecy required by national defense.

The committee is of the opinion that development of a catalog of this nature would be most salutary and that there should be a single depository where the water rights claims of the United States should be available for whatever purpose may be needed. This provision is not only helpful to all of the landowners who may be interested in the water rights of a particular stream but is exceedingly helpful to the United States in knowing where and how it can, on short notice, determine its holdings in this respect. This is a provision the committee believes should have been in force and effect long before now and believes that it will prove most helpful in the future administration and adjudication on questions of water rights, to say nothing of the incidental uses to which such a catalog may be made.

The committee, therefore, recommends that the bill S. 18, as amended, be considered favorably.

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, August 3, 1951.

Hon. PAT MCCARRAN,

Chairman, Committee on the Judiciary,
United States Senate, Washington, D.C.

MY DEAR SENATOR: The Department of Justice is unable to recommend the enactment of the bill (S. 18) to

authorize suits against the United States to adjudicate and administer water rights.

This measure would permit the joinder of the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights and is a necessary party to such suit. It would also provide that the United States could effect the removal to the Federal court of any such suit in which it is a party and that no judgment for costs shall be entered against the United States in any such suit. The last provision of the bill would authorize the service of summons or other process in any such suit upon the Attorney General or his designated representative.

The general waiver of the immunity of the United States to suits involving water rights would seem objectionable. It is likely that such a general waiver would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions, and the joinder of the United States in many actions in all of which it would be required to claim every right, which it could conceivably have or need, or subject itself to the possible loss of valuable rights on the theory of having split its cause of action. There is, moreover, no reason to believe that in any instance in which it is desirable to do so, Congress would fail to authorize making the United States a party defendant in the litigation of water rights.

The Director of the Bureau of the Budget has advised this office that there would be no objection to the submission of this report.

Yours sincerely,

PEYTON FORD,
Deputy Attorney General.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington 25, D. C., August 8, 1951.

Hon. PAT MCCARRAN,
Chairman, Committee on the Judiciary,
United States Senate, Washington 25, D. C.

MY DEAR SENATOR MCCARRAN: Reference is made to your request of April 27 for the views of this Department on S. 18, a bill to authorize suits against the United States to adjudicate and administer water rights.

I recommend that the bill be not enacted.

While there are some circumstances covered by the bill in which the relief which it would afford litigants may well be warranted, there are many others where it is more fitting that litigants be required to pursue their remedies under the Tort Claims Act or the Tucker Act.

The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of *United States v. Winters* (207 U. S. 564 (1908)) or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under the acts of July 26, 1866 (14 Stat. 253, 43 U. S. C. 661), July 9, 1870 (16 Stat. 218, 43 U. S. C. 661), and March 3, 1877 (19 Stat. 377, 43 U. S. C. 321); those with respect to which its officers and employees have followed the procedure prescribed in section 8 of the act of June 17, 1902 (32 Stat. 388, 43 U. S. C. 383); and those which it has acquired by purchase, gift, or condemnation from private owners. Since the United States can be said, with varying degrees of accuracy, to be the "owner" of rights of any or all these

types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the Nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter.

The brief exemplification of some of the types of interests given above does, however, suggest an approach to the problem which, we believe, merits consideration. Subject to the qualifications noted in the next paragraph, it seems to me to be proper for the United States to permit itself to be joined as a party defendant, with a right of removal (as is now provided in the bill) to the Federal district court, wherever,

> (1) in the course of a judicial proceeding in a State court for a general adjudication of rights to the consumptive use of waters within that State it is made to appear to the court that the United States is a claimant of such right and is a necessary party to the proceeding; that the right is claimed for the direct benefit of persons who, if they were themselves the claimants, would be subject to the laws of that State with respect to the appropriation, use, or distribution of water; and that the right claimed by the United States exists solely by virtue of the laws of the State and is required, by a statute of the United States, to be established by an officer or employee thereof in accordance with said laws or has been or is being acquired by the United States from a predecessor in interest whose right depends upon its having been so established; or
>
> (2) judicial review is sought, as provided by State law, by a person adversely affected by and a party to a State administrative proceeding relating to the appropriation, use, or distribution of water invoked by a duly authorized officer or employee of the United States upon the outcome of which a right of the United States depends.

The qualifications spoken of above which should, I believe, be attached to such a waiver of immunity are these: (a) The waiver should in all instances be limited to an adjudication of those rights of the United States which depend solely upon their having been acquired pursuant to State law and should not extend to those that exist independently of such law or to those which have existed for a stated number of years (say, 6 years); (b) it should be limited to those claims which are made to appear with particularity in the papers upon the basis of which the court is moved to make the United States a party; (c) it should not extend to the granting of equitable relief against the United States or to the entering of a judgment for costs against it; (d) the United States should not in any way be prejudiced in the adjudication by the existence of a prior decree granted in any adjudication to which it was not lawfully made a party; (e) the waiver should not extend to rights asserted by the United States for or on behalf of Indians.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours,

MASTIN G. WHITE,
Acting Assistant Secretary of the Interior.

AUGUST 24, 1951.

Re S. 18.
Hon. PAT MCCARRAN,
Chairman Committee on the Judiciary,
United States Senate.

DEAR SENATOR: I am in agreement with the general purposes of S. 18. However, there is one possible implication in the bill that has caused me some apprehension and I take this means of achieving clarification before final action by our committee occurs.

It appears to me that section 1 of the bill—although I am sure that is not the intent—might make it possible to

block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin.

I visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights—thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. Such action on the part of appropriators might be taken on their own initiative or might be stimulated by third parties who have been opposing this development.

A similar set of circumstances might prevail with respect to other streams in the Basin. I will appreciate the benefit of your best judgment as to whether S. 18 could be used in the manner I have described. I thing clarification on this point will be extremely useful if made a part of the legislative history of this bill.

I have another suggestion I respectfully submit for consideration of the committee. From all I can gather, there is no central place in the entire administrative branch of the Government where a catalog of water rights, to which the several agencies lay claim, has been assembled or is maintained. It appears to me it would be extremely helpful to the Attorney General to have access to an up-to-date list of the water rights he may be called upon to protect.

Accordingly, I am attaching a suggested new section for the bill and commend it to you for consideration before final action on S. 18 is taken.

Kindest personal regards.

Sincerely,

WARREN G. MAGNUSON, U. S. S.

AUGUST 25, 1951.

Hon. WARREN G. MAGNUSON,
United States Senate, Washington, D. C.

MY DEAR SENATOR MAGNUSON: I was very pleased to receive your letter of August 24, 1951, relative to S. 18, which provides for the joining of the United States in suits involving water rights where the United States has acquired or is in the process of acquiring water rights on a stream and is a necessary party to the suit.

I note that you raise the question that it might be possible to block or relay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin. You indicate that you visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending.

S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. I agree with you that for purposes of legislative history, the report should show that S. 18 is not intended to be used for the purpose of obstructing or delaying Bureau of Reclamation projects for the good of the public and water users by the method of which you speak and in that connection I propose that such a statement be incorporated in the report and that this exchange of letters be attached thereto.

You further suggest an amendment to the bill relative to the cataloging of water rights to which the several agencies of the Government lay claim and with this suggestion

I am heartily in accord. I believe that such an amendment should be presented to the committee for its incorporation into S. 18.

I trust that the foregoing has served to clarify the situation as to your doubts.

Kindest personal regards.

Sincerely,

PAT MCCARRAN, *Chairman.*

S. Rep. No. 755, Part 2, 82nd Cong., 2nd Sess. (1952):

Mr. McCarran, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany an amendment to S.18 as reported]

Strike out section 1 as proposed to be amended beginning on page 1, line 3 down to and including line 18 on page 2 and insert in lieu thereof the following:

"That consent is hereby given to join the United States as a defendant in any suit, (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State Law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments,

orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

Purpose

The purpose of the proposed amendment is to clarify the first committee amendment to S. 18 as reported by the Committee on the Judiciary on September 17, 1951.

Statement

It has come to the attention of the committee that there is a possible ambiguity in the language of section 1 of S. 18 as reported by the committee. The ambiguity consists in the following: The first sentence of the first proviso of section 1 is as follows:

> *Provided,* That nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

The second sentence of said first proviso is as follows:

> When the United States shall be a party to any such suit it shall be deemed to have waived any right to plead that the State laws are not applicable, or that the United States is not amenable thereto, by reason of the sovereignty of the United States, and the United States shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances.

It has been stated that the second sentence of the proviso may refer back to the first sentence and be restricted to suits of that category rather than to the first part of the section which authorizes the joining of the United States as a defendant in any suit as to the adjudication of rights to the water. While the committee does not believe that such is the case, in order to make the matter extremely clear the above amendment is offered.

It has been noted that the amendment to section 1 is in somewhat different form than section 1 appears at the present time, but it was felt that in order to convey a clearer meaning the form now submitted is better. The committee believes and is of the opinion that this amendment does not in any way change the effect of section 1 as reported but simply rearranges the language thereof so as to make the intent thereof clear and unmistakable.

FILED
AUG 30 1982
STEVAS,
CLERK

No. 81-2188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF MONTANA, *et al.*,
Petitioners

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CROW TRIBE, CONFEDERATED SALISH AND KOOTENAI TRIBES, ASSINIBOINE AND SIOUX TRIBES, NORTHERN CHEYENNE TRIBE, AND JAMES BOWEN

REID PEYTON CHAMBERS *
WILLIAM R. PERRY
LOFTUS E. BECKER, JR.
SONOSKY, CHAMBERS, SACHSE & GUEDO
1050 31st St., N.W.
Washington, D.C. 20007
(202) 342-9181
* *Counsel of Record for Respondent Assiniboine and Sioux Tribes*

ROBERT S. PELCYGER *
FREDERICKS & PELCYGER
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 443-1666
* *Counsel of Record for Respondent Crow Tribe*

JEANNE S. WHITEING *
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760
* *Counsel of Record for Respondent Northern Cheyenne Tribe*

RICHARD ANTHONY BARNEN *
WILKINSON, CRAGUN & BARKER
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4200
* *Counsel of Record for Respondent Confederated Salish and Kootenai Tribes*

STEVEN L. BUNCH *
301 Steamboat Block
616 Helena Avenue
Helena, Montana 59601
(406) 442-9220
* *Counsel of Record for Respondent James Bowen*

August 30, 1982

WILSON - EPES PRINTING CO., INC. - 783-0300 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ADDITIONAL STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
1. Filing the Federal Court Suits	2
2. Subsequent State Court Proceedings	3
3. Federal District Court Proceedings and Congressional Oversight Hearings	4
4. Proceedings in the Ninth Circuit	5
ARGUMENT	6
I. The Ninth Circuit's holding that dismissal was not warranted under *Colorado River* is not a question worthy of review	8
II. Review should be denied because the Ninth Circuit's holding that state court proceedings would not adequately protect the Indian Tribes' interests is correct and unchallenged	9
III. Review should be denied because the Ninth Circuit's conclusion that the McCarran Amendment does not apply to actions brought by Indian tribes under 28 U.S.C. § 1362 is correct and unchallenged	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES: Page

Antoine v. *Washington*, 420 U.S. 194 (1975) 16
Arizona v. *California*, 373 U.S. 546 (1963) 15
Arizona v. *San Carlos Apache Tribe*, 668 F.2d 1093 (9th Cir. 1982) 6, 7
Bryan v. *Itasca County*, 426 U.S. 373 (1976) 16
Central Machinery Co. v. *Arizona State Tax Comm'n.*, 448 U.S. 160 (1980) 16
Colorado River Water Conservation District v. *United States*, 424 U.S. 800 (1976) 2, 5-9, 12
DeCoteau v. *District County Court*, 420 U.S. 425 (1975) 17
Fisher v. *District Court*, 424 U.S. 382 (1976) 16
Fuller v. *Volk*, 351 F.2d 323 (3d Cir. 1965) 12
Hansberry v. *Lee*, 311 U.S. 32 (1940) 11
Heckman v. *United States*, 224 U.S. 413 (1912) 11
Jicarilla Apache Tribe v. *United States*, 601 F.2d 1116 (10th Cir.), cert. denied, 444 U.S. 995 (1979) 7, 8
Kennerly v. *District Court*, 400 U.S. 423 (1971) .. 16
McClanahan v. *Arizona Tax Comm.*, 411 U.S. 164 (1973) 16
Mattz v. *Arnett*, 412 U.S. 481 (1973) 16
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 (1973) 17
Metlakatla Indian Comm. v. *Egan*, 369 U.S. 45 (1962) 17
Minnesota v. *United States*, 305 U.S. 382 (1939) .. 13
Morton v. *Mancari*, 417 U.S. 535 (1974) 14
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 305 (1950) 11
Navajo Nation v. *United States*, 668 F.2d 1100 (9th Cir. 1982) 7
New Mexico v. *Aamodt*, 537 F.2d 1102 (10th Cir.), cert. denied, 429 U.S. 1121 (1976) 11
Northern Cheyenne Tribe v. *Adsit*, 668 F.2d 1080 (9th Cir. 1982) 5-6, 9-11, 12, 15
Northern Cheyenne Tribe v. *Tongue River Water Users' Association*, 484 F.Supp. 31 (D. Mont. 1979) 5, 9

TABLE OF AUTHORITIES—Continued

	Page
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.* —— U.S. ——, 50 U.S.L.W. 4892 (June 28, 1982)	18
Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 (1968)	16
Puyallup Tribe v. *Dept. of Game*, 391 U.S. 392 (1968)	17
Puyallup Tribe v. *Dept. of Game*, 433 U.S. 165 (1977)	17
Ramah Navajo School Board, Inc. v. *New Mexico Bureau of Revenue*, —— U.S. ——, 50 U.S.L.W. 5101 (July 2, 1982)	16-17
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978)	14
Satiacum v. *Washington*, 414 U.S. 1 (1973)	17
Seymour v. *Superintendent*, 368 U.S. 351 (1962)	16
Thermtron Products, Inc. v. *Hermansdorfer*, 423 U.S. 336 (1976)	9
Tonasket v. *Washington*, 411 U.S. 451 (1973)	17
United States v. *John*, 437 U.S. 634 (1978)	16
United States v. *Truckee-Carson Irrigation District*, 649 F.2d 1286 (9th Cir. 1981), 666 F.2d 351 (9th Cir. 1982)	11
Village of Kake v. *Egan*, 369 U.S. 60 (1962)	17
Warren Trading Post v. *Arizona Tax Comm.*, 380 U.S. 685 (1965)	16
Washington v. *Fishing Vessel Ass'n.*, 443 U.S. 658 (1979)	17-18
Washington v. *Washington State Commercial Passenger Fishing Ass'n.*, 443 U.S. 658 (1979)	16
Washington Game Dept. v. *Puyallup Tribe*, 414 U.S. 44 (1973)	16
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980)	16
Wilson v. *Omaha Indian Tribe*, 442 U.S. 653 (1979)	17
Winters v. *United States*, 207 U.S. 564 (1908)	15
Yoder v. *Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 339 F.2d 360 (9th Cir. 1964)	13

TABLE OF AUTHORITIES—Continued

STATUTES AND CONSTITUTIONAL PROVISIONS:	Page
25 U.S.C. § 175	11
28 U.S.C. § 1362	1, 2, 5, 6, 12-15
28 U.S.C. § 1345	2
28 U.S.C. § 1331	13
43 U.S.C. § 666	5, 14-15
Montana Constitution Article I	5
Revised Code of Montana § 89-865 *et seq.*	3
Montana Code Ann. § 85-2-101 *et seq.*	3, 4
OTHER MATERIALS:	
Bogert on Trusts § 593 (2d ed. 1960)	11
The Federalist No. 81 (A. Hamilton) (J. Cooke ed. 1961)	18
H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S. Code, Cong. & Admin. News 3145	13, 14
Oversight Hearings on Litigation Involving Water Rights in Montana Before the Senate Select Committee on Indian Affairs, 96th Cong., 1st Sess. (1979)	4-5
President's Message to Congress on Indian Affairs, 116 Cong. Rec. 23395 (1970)	10
S. Rep. No. 1507, 89th Cong., 2d Sess. 3 (1966)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2188

THE STATE OF MONTANA, *et al.*,
Petitioners

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS CROW TRIBE, CONFEDERATED SALISH AND KOOTENAI TRIBES, ASSINIBOINE AND SIOUX TRIBES, NORTHERN CHEYENNE TRIBE, AND JAMES BOWEN

ADDITIONAL STATUTE INVOLVED

The Act of October 10, 1966, 80 Stat. 880, 28 U.S.C. § 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

The petition for certiorari involves seven different cases, all filed in federal court to adjudicate water rights on various river systems in the State of Montana, and consolidated for decision in the District Court.

1. Filing the Federal Court Suits

In January 1975, respondent Northern Cheyenne Tribe filed an action in the District Court pursuant to 28 U.S.C. § 1362 to adjudicate water rights in the Tongue River and Rosebud Creek and their tributaries in Montana. Two months later, the United States filed two suits in the District Court under 28 U.S.C. § 1345. Both suits claimed that the United States was the owner of extensive water rights on its own behalf for national forests, reclamation projects, and other non-Indian uses, and that it held additional rights in trust for the Indians. One complaint covered the Tongue River and Rosebud Creek and their tributaries, which arise on the Crow and then flow through the Northern Cheyenne Reservation. The other concerned all other waters bordering, traversing, or underlying the Crow Reservation. All known claimants to water rights within the affected drainages were named as defendants.[1] Respondent Crow Tribe moved to intervene in both of the Government's suits, and respondent Northern Cheyenne Tribe in the first. All three cases were consolidated by the District Court. Montana and other defendants filed motions to dismiss, which were renewed and argued in July 1976 just after this Court's decision in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) (hereafter "*Colorado River*").

Four additional suits were brought by the United States in the District Court in April 1979 to adjudicate water rights on the streams that border or traverse the

---

[1] Respondent Bowen is the non-Indian heir to an Indian allotment located on the Northern Cheyenne Reservation, and claims reserved water rights.

Fort Peck, Blackfeet, Flathead, Rocky Boys, and Fort Belknap Indian Reservations in Montana. As in 1975, the United States claimed extensive water rights for competing, non-Indian uses[2] as well as for the Indian reservations. These complaints also named all known claimants. Respondents Confederated Salish and Kootenai Tribes of the Flathead Reservation moved to intervene, and the Assiniboine and Sioux Tribes of the Fort Peck Reservation have intervened in the suits affecting their respective reservations.

2. Subsequent State Court Proceedings

The Montana Legislature had enacted a Water Use Act in 1973. R.C.M. § 89-865 *et seq.* This Act was amended in 1975 and has since been repealed. See Pet. App. F, pp. 62-101. Proceedings were initiated under this Act only after the first suits were filed in federal court, and never progressed far.[3] In May 1979, one month after the four 1979 suits were filed, Montana enacted an entirely new Water Use Act, M.C.A. § 85-2-101 *et seq.* Under this Act, all claimants to water rights in Montana

---

[2] For example, in the Milk River case the United States claims rights to use water for Glacier National Park; for the Milk River Project of the Bureau of Reclamation; for grazing, stock watering, and water holes, and from various nonproducing oil and gas wells on public lands; for five national wildlife refuges and three waterfowl production areas; for two military installations; for customs stations; and to maintain and operate four reservoirs. In addition, in that case it claims rights on behalf of four different Indian tribes from the same source.

[3] Petitioners are mistaken when they say (Pet. 7) that state court proceedings under this Act had been initiated prior to January and March 1975, when the first three of the present suits were filed. In July 1975, Montana filed petitions in the state district courts for Rosebud and Yellowstone Counties requesting those courts to issue orders requiring claimants to water rights to file declarations of their claims. No such order was ever issued in Rosebud County. On August 26, 1975, an order "effective March 1, 1977" was issued by the Yellowstone County court.

must file their claims by a date to be determined by the Montana Supreme Court on petition of the Attorney General. M.C.A. § 85-2-212. In May 1979 the Attorney General filed such a petition, and in June 1979, that court ordered that all claims to water rights arising before July 1973 be filed by January 1, 1982. Pet. App. H, pp. 128-132. The time was subsequently extended to April 30, 1982. *Id.* The Montana Supreme Court rejected a request by the United States for a further delay because of the pendency of these lawsuits, stating that "[t]he pendency of federal litigation does not affect the State of Montana in proceeding to adjudicate non-Indian claims." Pet. App. I, at pp. 144. In fact, no actual adjudications under the statute have been commenced or scheduled: the law provides for suspension of adjudication proceedings during the pendency of settlement negotiations.[4] *See* M.C.A. §§ 85-2-217 (as amended in 1981), 85-2-701 to -703.

3. Federal District Court Proceedings and Congressional Oversight Hearings

In July 1979 the District Court, *sua sponte*, stayed the four 1979 suits. During July and August of 1979, the Senate Select Committee on Indian Affairs, chaired by Senator Melcher of Montana, held oversight hearings on the Montana water rights cases in Washington, D.C. and in three Montana cities. Senate Select Committee on Indian Affairs, 96th Cong., 1st Sess., *Oversight Hearings on Litigation Involving Water Rights in Montana* (1979). At these hearings, witness after witness urged their Senator to procure the immediate dismissal of the federal suits. *E.g.*, *id.*, at 61, 107, 184-85, 196, 241. The Indians' own Congressman testified that they should either surrender their protection under federal law or leave Montana. *Id.*, at 281. Expressions of outrage at the

[4] Five tribes—Crow, Fort Belknap, Fort Peck, Northern Cheyenne and Rocky Boys—are negotiating with the State, so state court proceedings as to those tribes are in suspension.

tribes' effrontery in asserting their rights in federal court were numerous. *E.g.*, *id.*, at 206, 238-39, 502, 575-576. The federal water suits were characterized as "senseless harassment" of Montana's citizens. *Id.*, at 183. In November 1979, Judges Battin and Hatfield (to whom the seven cases had been severally assigned), acting without additional motions, briefing, or argument, issued a joint Memorandum Opinion and Order dismissing the cases based on *Colorado River's* "policy of wise judicial administration." *Northern Cheyenne Tribe* v. *Tongue River Water Users' Association*, 484 F. Supp. 31 (D. Mont. 1979); Pet. App. E, pp. 53-61.

4. Procedings in the Ninth Circuit

The Ninth Circuit, one judge dissenting, reversed. *Northern Cheyenne Tribe* v. *Adsit*, 668 F.2d 1080 (9th Cir. 1982); Pet. App. C, D, pp. 26, 52. The Ninth Circuit based its decision on four alternative grounds. First, that the jurisdictional disclaimers in the Montana Constitution, Article I, prevented Montana courts from adjudicating questions of water rights on Indian lands unless the disclaimer had been properly repealed. 668 F.2d at 1083-1087, Pet. App. 28-38. Second, that under the test laid down in *Colorado River*, there were no exceptional circumstances warranting dismissal in face of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River*, 424 U.S., at 817. 668 F.2d at 1087-1089, Pet. App. 38-43. Third, that in light of the United States' conflicts of interest in seeking to establish claims of its own adverse to those of the Indian tribes it represented, suits against the United States in state court pursuant to the McCarran Amendment, 43 U.S.C. § 666, would not be adequate to protect the rights of the Indian tribes. 668 F.2d at 1089-1090, Pet. App. 43-44. And fourth, that suits by Indian tribes to adjudicate water rights under 28 U.S.C. § 1362 were not rendered subject to dismissal by the McCarran Amendment's consent to state court jurisdiction over water rights suits against the United

States. 668 F.2d at 1090, Pet. App. 44-45. Each of these factors was held to differentiate the Montana water cases from *Colorado River*, and to require that federal jurisdiction be retained.[5]

ARGUMENT

This is simply not a case warranting the exercise of this Court's certiorari jurisdiction. The Court of Appeals held for respondents on four alternative grounds, only two of which are challenged in the petition for certiorari.[6] Assuming for present purposes that the disclaimer issue, which is also before this Court in No. 81-2147, *Arizona* v. *San Carlos Apache Tribe*, would otherwise be worthy of consideration on certiorari, that issue is not properly reviewed on this record because, entirely apart from the disclaimer issue, the Ninth Circuit's judgment rests on three alternative grounds.

Two of those grounds—that the Government's conflicting interests in the waters in question renders a state court suit against the United States inadequate to protect the interests of the respondent tribes, and that by virtue of 28 U.S.C. § 1362, the Indian tribes' suits are not subject to dismissal under the McCarran Amendment[7]—are not even raised in the petition for certiorari.[8]

---

[5] The Court of Appeals also directed the District Court to grant the Crow Tribe's motion to intervene. 668 F.2d at 1090, Pet. App. 45-46.

[6] Question 1 in the petition for certiorari raises the disclaimer issue, and Question 3 challenges the Ninth Circuit's holding that the *Colorado River* standards were met. Question 2 appears to present the question of how state disclaimer provisions can be validly repealed. There is no mention of § 1362 or the adequacy of the state forum. Although the Government's Memorandum may seek to raise the § 1362 issue, the Government is not a petitioner but a respondent.

[7] This question was reserved in *Colorado River*. 424 U.S. at 820 n.26.

[8] They are also not mentioned in the briefs *amici* supporting the petition.

The remaining ground (that dismissal was improper under the standards laid down in *Colorado River*) involves merely the application of a known rule of law to the facts at hand. This process, in our view, does not present any issue of general applicability worthy of discretionary review. The United States differs with our position, and supports review of this case because it hopes that this Court will take the opportunity to "clarify" its prior decision in *Colorado River*. But the meaning of *Colorado River* has not extensively troubled the Courts of Appeals, for very few decisions in those courts have even had occasion to consider it.[9] Clarification of *Colorado River* in this Court should follow, not precede, evidence that the Circuits are in confusion or in substantial conflict over the meaning of that case. With deference, we suggest that there is no need for this Court to engage in further explication of *Colorado River* at this time.

Since the judgement below therefore rests on three alternative grounds, there is no reason to reach the disclaimer question in this case. Moreover, respondents respectfully suggest that disposition of this case should not be delayed in the event that the Court should grant certiorari on that question in No. 81-2147. The Ninth Circuit's judgement would not be affected even if the disclaimer issue were resolved in petitioners' favor. This Court sits to review judgements, not opinions; and entirely apart from the disclaimer question, the judgement of the Ninth Circuit rests on independent grounds, two of

---

[9] Since *Colorado River* was decided in 1976, the Courts of Appeals have faced only four reported water rights cases involving this question. They are the instant case; its two companions, *Arizona* v. *San Carlos Apache Tribe*, 668 F.2d 1093 (9th Cir. 1982), and *Navajo Nation* v. *United States*, 668 F.2d 1100 (9th Cir. 1982), currently pending as No. 81-2147 in this Court; and *Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116 (10th Cir.), cert. denied, 444 U.S. 995 (1979). Of the four decisions, this is the only one that reached the question of compliance with the *Colorado River* standards.

which are not raised in the petition for certiorari [10] and the third of which does not warrant this Court's review.

I. The Ninth Circuit's holding that dismissal was not warranted under *Colorado River* is not a question worthy of review.

No issues of general importance are raised by the Court of Appeals' resolution on this question. There is no dispute that *Colorado River* presents the rule for decision.[11] The only pertinent question—whether on the particular facts of the case, the Court of Appeals applied the standard correctly—is certainly not one of general importance. Indeed, application of the *Colorado River* standards has only rarely arisen in the Courts of Appeals, and without conflicting results.[12]

Nor is the Court of Appeals' resolution of the question causing difficulties with the adjudication of other water rights in the State of Montana. As the Montana Supreme Court stated, "The pendency of federal litigation does not affect the State of Montana in proceeding to adjudicate non-Indian claims." *In re Petition of the United States* (April 27, 1982), Pet. App. I, at 144.

---

[10] That two grounds supporting the judgment are not even raised by petitioners makes this case a particularly inappropriate one in which to engage in extensive consideration of the scope of *Colorado River*.

[11] In seeking "clarification" of *Colorado River*, the United States appears in some respects to seek modification of the principles of that case—as it did the only other time the question was raised in this Court, three years ago. See Memorandum for the United States, *Jicarilla Apache Tribe* v. *United States* (No. 79-475), cert. denied, 444 U.S. 995 (1980). But the factors in *Colorado River*, whether or not "clarified" as the Government would have them, support the decision below. The United States does not argue for reversal. "Clarification," if necessary at all, should await a case where the outcome would be affected or where confusion among the Circuits requires resolution.

[12] See note 9 above.

Moreover, the Court of Appeals was correct. Not surprisingly, petitioners devote scant attention to this question in their petition. The District Court reached a contrary conclusion in part because that court's fear of docket congestion, a ground for dismissal clearly improper under *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 344 (1976). See 484 F. Supp. at 36, Pet. App. E, at 61. Petitioners and *amici* supporting them point to no respects in which the Court of Appeals' analysis and application of the *Colorado River* factors were flawed.[13] The Ninth Circuit's conclusion, which fully supports its judgement, does not deserve further review by this Court.

II. Review should be denied because the Ninth Circuit's holding that state court proceedings would not adequately protect the Indian Tribes' interests is correct and unchallenged.

An additional ground upon which the Ninth Circuit's judgement rests is that the Tribes' suits should not be dismissed because the Indians' interests would not be adequately protected by a state court suit against the United States, since the United States' disabling conflicts of interests with regard to the waters involved in this case prevent it from adequately represeting the Indians. See 668 F.2d at 1089-1090, Pet. App. at 43-44, 51-52.

These seven Montana cases involve virtually every federal water right in the entire State of Montana—some owned by the United States in its proprietary capacity and some as trustee for Indian beneficial owners. The case concerning the Milk River (No. 80-3032 in the Court

---

[13] The District Court also feared that if jurisdiction over the federal cases were retained, it would be necessary to stay the state proceedings. But in light of the Montana Supreme Court's conclusion that the state proceedings can efficiently proceed notwithstanding the federal actions—a conclusion not available to the District Court when it ordered the federal actions dismissed—this is clearly not so.

of Appeals) provides an excellent example of the conflicts of interest that preclude the United States from adequately representing Indian interests as trustee. First, the United States claims rights to the use of water for Glacier National Park; for the Milk River Project of the Bureau of Reclamation; for grazing, stock watering, water holes, and other uses, and from nonproducing oil and gas wells, on public lands; for five national wildlife refuges and three waterfowl product areas; for two military installations; for customs stations; and to maintain and operate four reservoirs. In addition to all these rights asserted on its own behalf, the Government also claims water rights as trustee for four separate Indian reservations: Rocky Boys, Blackfeet, Fort Belknap, and Fort Peck.

There is simply no way that the United States, with the best will in the world, could provide loyal and undivided representation for all of the Indian interests in light of such conflicts. President Nixon's Message to the Congress on Indian Affairs, 116 Cong. Rec. 23395, 23398 (1970) (emphasis in original) recognized this:

> The Secretary of the Interior and the Attorney General must at the same time advance *both* the *national* interest in the use of land and water rights *and* the *private* interests of Indians in land which the government holds as trustee . . .
>
> No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position . . . There is considerable evidence that the Indians are the losers when such situations arise.

If these federal cases are dismissed, the state court proceedings will be wholly inadequate. The Tribes are not parties to these state actions, and cannot be joined involuntarily. 668 F.2d at 1089-1090, Pet. App. 44. Although normally a suit against the United States could

adjudicate the rights of its Indian trust beneficiaries, *Heckman* v. *United States*, 224 U.S. 413 (1912); 25 U.S.C. § 175, this cannot be done here because the United States has an interest in the outcome by virtue of its own proprietary claims to water adverse to the Indian claims and, in addition, the United States would be the sole representative of the conflicting rights of several beneficiaries. 688 F.2d at 1089, Pet. App. 43, 51-52. Neither the law of trusts, *see* Bogert on Trusts § 593 (2d ed. 1960), nor the general law would permit the Indians' rights to be adjudicated in a proceeding where they were represented by such a conflict-ridden trustee. *See Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 305, 316-317 (1950); *Hansberry* v. *Lee*, 311 U.S. 32, 42-45 (1940); *United States* v. *Truckee-Carson Irrigation District*, 649 F.2d 1286 (9th Cir. 1981), 666 F.2d 332 (9th Cir. 1982), petitions for certiorari pending, Nos. 81-2245, 81-2276, and 82-38; *New Mexico* v. *Aamodt*, 537 F.2d 1102, 1106 (10th Cir.), cert. denied, 429 U.S. 1121 (1976). Fundamental rights to due process would be denied the Tribes.

The petition for certiorari does not challenge the Court of Appeals' conclusion that the United States cannot adequately represent the Tribes' interests in state court.[14] The Government's disabling conflicts render any state court proceedings inadequate, and, standing alone, are sufficient to support retention of federal jurisdiction. This question, not presented by prior cases in this Court or any Court of Appeals, does not deserve discretionary review the very first time it arises.

---

[14] Although the Ninth Circuit's opinion could be read as considering the inadequacy of the state proceedings as merely one of the factors to be balanced in the *Colorado River* equation, we believe that the opinion is better understood as finding the Government's conflict and the lack of tribal participation in the state court are independent reasons requiring retention of the cases. *See* 668 F.2d at 1089-1090, Pet. App. at 43-44, 51-52. In any event, even if we are wrong in our understanding of the Ninth Circuit's *opinion*, its *judgement* is independently supported by the fact that the Government's conflict would not taint the outcome of the federal suits.

III. Review should be denied because the Ninth Circuit's conclusion that the McCarran Amendment does not apply to actions brought by Indian tribes under 28 U.S.C. § 1362 is correct and unchallenged.

The first of these lawsuits, brought to adjudicate rights to the streams traversing the Northern Cheyenne Reservation, was initiated by respondent Northern Cheyenne Tribe pursuant to 28 U.S.C. § 1362. Section 1362 also provides an independent source of federal jurisdiction for the intervention of the other three respondent tribes in the actions initiated by the United States. See *Fuller* v. *Volk*, 351 F.2d 323, 328-329 (3d Cir. 1965). Resolving an issue specifically left open by *Colorado River*, 424 U.S. at 820 n.26, the Ninth Circuit held that dismissal of suits brought under § 1362 involving the adjudication of Indian water rights in favor of later commenced state court proceedings is improper. 668 F.2d at 1090, Pet. App. 44-45.

This holding, which is sufficient to support the judgment below (and therefore to counsel denying the petition) with regard to the respondent Indian tribes, is not questioned in the petition for certiorari.[15] It is not disputed by the United States. Even if it were challenged, this is not the kind of question that would justify review by this Court in the very first reported case in which it has been decided by a Court of Appeals.[16] And as

---

[15] As with the Government's conflict of interest (*see* note 14 above), it is possible to read the Ninth Circuit's opinion as considering that this was merely another factor to be considered under *Colorado River*. *See* 668 F.2d at 1090, Pet. App. 44-45. However, *Colorado River* appears to reserve this as a separate issue (*see* 424 U.S. at 820 n.26) and we believe the Ninth Circuit so treated it. In any event it *is* a separate issue, fully adequate to support the Ninth Circuit's *judgement* with respect to the respondent Tribes, and not worth discretionary review the first time it has ever been addressed by a Court of Appeals.

[16] The question is not discussed in the Tenth Circuit's opinion in *Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116 (10th Cir. 1979), cert. denied, 444 U.S. 995 (1979).

discussed below, it was decided correctly by the Court of Appeals.

Section 1362 was enacted in 1966. It provides for federal jurisdiction over civil actions brought by Indian tribes and arising under the Constitution, laws or treaties of the United States, without regard to the amount in controversy.[17] The legislative history of § 1362 demonstrates that it was prompted by *Yoder* v. *Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 339 F.2d 360 (9th Cir. 1964), which held that Indian tribes could not bring property litigation in the federal courts without satisfying the $10,000 amount in controversy requirement.[18] *See* H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S. Code, Cong. & Admin. News 3145, 3146-3147. Significantly, Congress by enacting § 1362 decided to allow all cases brought by tribes presenting issue of federal law to be heard in federal court.

Congress passed Section 1362 for four reasons. First, because "traditionally, the matters concerning Indian lands under trust allotments fall within the exclusive control of the Federal Government. The judicial determination of controversies concerning such lands commonly is committed to the Federal courts, *Minnesota* v. *United States*, 305 U.S. 382 (1939)."[19] H.R. Rep. No. 2040 at 2, 1966 U.S.C.C.&A.N. at 3146. Second, "particularly as to this class of cases [arising under federal law] it is

---

[17] Section 1362 is quoted in full at p. 1 above.

[18] The $10,000 in controversy requirement was not removed generally for federal question jurisdiction until 1980. P.L. 96-486, § 2(a), 94 Stat. 2369, codified as 28 U.S.C. § 1331.

[19] In *Minnesota* v. *United States*, 305 U.S. 382 (1939), Mr. Justice Brandeis wrote for a unanimous Court holding that state courts had no jurisdiction of a lawsuit to condemn Indian allotted lands even though, by Act of Congress, state substantive law would be applied and such a suit could properly be brought in federal court.

appropriate that the actions be brought in the U.S. District Court." *Id.*; *see also* S. Rep. No. 1507, 89th Cong., 2d Sess. 3 (1966). Third, "There is great hesitancy on the part of the tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated." S. Rep. No. 1507, *supra*. Finally, "Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years." *Id.*

Section 1362 evinces clear congressional policy that federal courts are the proper forum for deciding suits brought by Indian tribes to protect their property rights arising under federal law. Congress specifically determined that a federal court should be available to decide such cases, recognizing too that Indian tribes, often with good reason, have long feared the exercise of state authority over them.

The Ninth Circuit's construction of Section 1362 is fully consistent with the purposes and policies of the McCarran Amendment—although were there any conflict between the two, § 1362, which is both later in time and, since it deals only with Indian tribes, is the more specific statute, would control. *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). The McCarran Amendment waives the immunity from suit of the United States as a defendant in federal and state court adjudications of water rights. It thus ensures that comprehensive water rights adjudications can be had and permits the United States to be sued as trustee for Indian water rights in appropriate circumstances; but it does not mention Indian tribes and clearly does *not* waive their immunity from suit. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). By contrast, § 1362 ensures tribes a federal forum where Indian tribes commence suits as plaintiffs to protect their federal rights (be they rights to water or otherwise). The McCarran Amendment's waiver of the Government's

immunity is irrelevant to actions brought by another party (in these cases Indian tribes), which was not a focus of Congress's consideration when the McCarran Amendment was enacted.

The Ninth Circuit's decision allows both statutory schemes to operate. Where no suit is pending in federal court in which a tribe is plaintiff, a state may sue the United States as a defendant under the McCarran Amendment, and normally may include Indian rights for which the United States is a trustee. On the other hand, once a Tribe has invoked the policy of § 1362 by bringing or intervening in a federal court action, a State surely cannot "prevent Indians from fully litigating their rights to water in federal court" simply by subsequently enacting a water adjudication statute and joining the United States in a duplicative state court action. Compare 668 F.2d at 1090, Pet. App. C, at 45.

Since Section 1362 affords an independent basis for the Ninth Circuit's judgment, the issue was not raised in the petition for certiorari, and the Ninth Circuit's determination does not conflict with any other lower court decision, the petition should be denied.

CONCLUSION

Certiorari should be denied in this case and the long-delayed adjudication of Indian water rights allowed to proceed in federal court. The Ninth Circuit's decision vindicates a long-standing policy favoring federal over state courts as the forum to adjudicate federal-law claims to property asserted by Indian tribes. Indian tribes that have first brought federal court actions to protect their precious reserved water rights—"without which their lands would have been useless," *Winters* v. *United States*, 207 U.S. 564, 576 (1908); accord, *Arizona* v. *California*, 373 U.S. 546, 600 (1963)—should not be displaced into state court.

This Court needs no lengthy reminder of the frequency with which it has in recent years been required to review and reverse decisions of state courts on Indian law questions. Since 1960, this Court has considered 23 such state decisions. It has reversed or vacated 19 of these decisions, 12 unanimously.[20] This Court's decisions

---

[20] The decisions reversed were:

Ramah Navajo School Board, Inc. v. *New Mexico Bureau of Revenue*, —— U.S. ——, 50 U.S.L.W. 5101 (July 2, 1982) (6-3) (New Mexico);

White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980) (6-3) (Arizona);

Central Machinery Co. v. *Arizona State Tax Comm'n.*, 448 U.S. 160 (1980) (5-4) (Arizona);

United States v. *John*, 437 U.S. 634 (1978) (9-0) (Mississippi);

Bryan v. *Itasca County*, 426 U.S. 373 (1976) (9-0) (Minnesota);

Fisher v. *District Court*, 424 U.S. 382 (1976) (9-0) (Montana);

Antoine v. *Washington*, 420 U.S. 194 (1975) (7-2) (Washington);

Washington Game Dept. v. *Puyallup Tribe*, 414 U.S. 44 (1973) (9-0) (Washington);

Mattz v. *Arnett*, 412 U.S. 481 (1973) (9-0) (California);

McClanahan v. *Arizona Tax Comm.*, 411 U.S. 164 (1973) (9-0) (Arizona);

Kennerly v. *District Court*, 400 U.S. 423 (1971) (7-2) (Montana);

Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 (1968) (8-0) (Oklahoma);

Warren Trading Post v. *Arizona Tax Comm.*, 380 U.S. 685 (1965) (9-0) (Arizona);

Seymour v. *Superintendent*, 368 U.S. 351 (1962) (9-0) (Washington).

The decisions vacated were:

Washington v. *Washington State Commercial Passenger Fishing Ass'n.*, 443 U.S. 658 (1979) (6-3) (Washington);

[Footnote continued on page 17]

since *Colorado River* have expressly alluded to the hostile treatment sometimes accorded Indians in state courts. *See, e.g., Ramah Navajo School Board* v. *New Mexico Bureau of Revenue*, —— U.S. ——, 50 U.S.L.W. 5101, 5105 (July 2, 1982) (expressing "disappointment that the [state] courts below apparently gave short shrift to this principle [of construing Indian statutes and regulations generously to comport with traditional notions of tribal sovereignty] and to our precedents in this area . . . ."); *Washington* v. *Fishing Vessel Ass'n.*, 443 U.S. 658, 696 n. 36 (1979) ("Except for some desegregation cases, the [federal] district court has faced the most concerted official and private efforts [by, among others, Washington's state courts] to frustrate a decree of a federal court [establishing Indian fishing rights] witnessed in this century."); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 673-674 (1979) ("Adequate means are . . . available to insure fair treatment of tribal and federal interests [because] the legal issues are Federal and the federal courts will have jurisdiction to hear them."

Although this Court in the past has been generous with its time, plenary review here of the myriad ques-

---

[20] [Continued]

Puyallup Tribe v. *Department of Game*, 433 U.S. 165 (1977) (7-2) (Washington);

Satiacum v. *Washington*, 414 U.S. 1 (1973) (9-0) (Washington);

Tonasket v. *Washington*, 411 U.S. 451 (1973) (9-0) (Washington);

Metlakatla Indian Comm. v. *Egan*, 369 U.S. 45 (1962) (9-0) (Alaska).

By contrast, this court affirmed only three state court decisions—*DeCoteau* v. *District County Court*, 420 U.S. 425 (1975) (6-3) (South Dakota); *Puyallup Tribe* v. *Dept. of Game*, 391 U.S. 392 (1968) (9-0) (Washington); *Village of Kake* v. *Egan*, 369 U.S. 60 (1962) (9-0) (Alaska);—and partially reversed and partially affirmed the state court decision in one case—*Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973) (6-3) (New Mexico).

tions of law and of fact involved in Indian water rights litigation is simply not feasible.[21] Many of these questions are not of general importance. When the United States is forced to sue or be sued in state courts, at worst its vital interests can be protected by remedial legislation in Congress. Not so for small and powerless Indian tribes. For them a federal district court—with review of right by a federal court of appeals—may be the last forum practically available.

The congressional hearings on this litigation, described at pp. 4-5 above, give ample evidence that water and Indians are as highly charged in Montana as the fishing rights in *Washington* v. *Fishing Vessell Ass'n., supra.* Thus, these cases are paradigms of the kinds of "national causes" [22] for which the Framers of our Constitution established an independent federal judiciary whose judges enjoy constitutional guarantees of life tenure and fixed and irreducible compensation for their services. *See Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, —— U.S. ——, 50 U.S.L.W. 4892, 4894-95 (June 28, 1982). Montana's elected judges, in Hamilton's words, "will be too little independent to be relied upon for an inflexible execution of the national laws." *The Federalist No. 81* (Hamilton) 547 (J. Cooke ed. (1962).[23]

---

[21] For an example of the kind of issues that must be resolved to determine the extent of Indian water rights, *see, e.g.*, the February 22, 1982 Report of the Special Master in *Arizona* v. *California*, currently pending as No. 8, Original, in this Court.

[22] *The Federalist No. 81* (Hamilton) 547 (J. Cooke ed. 1962).

[23] Hamilton's words were echoed almost two centuries later by the National Water Commission. That Commission recommended generally that federal water rights claims be tried in state courts. With regard to Indian claims, however, "[b]ecause of potential conflict between Indian and non-Indian water users and to avoid the suspicion of bias that might attend adjudication by elected State officials," the Commission recommended adjudication in federal courts. National Water Commission, Water Policies for the Future: Final Report to the President and to the Congress of the United States 479 (1973).

The petition for certiorari should be denied.

Respectfully submitted,

REID PEYTON CHAMBERS *
WILLIAM R. PERRY
LOFTUS E. BECKER, JR.
SONOSKY, CHAMBERS, SACHSE & GUIDO
1050 31st St., N.W.
Washington, D.C. 20007
(202) 342-9131
* *Counsel of Record for the Respondent Assiniboine and Sioux Tribes*

ROBERT S. PELCYGER *
FREDERICKS & PELCYGER
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 443-1683
* *Counsel of Record for Respondent Crow Tribe*

JEANNE S. WHITEING *
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760
* *Counsel of Record for Respondent Northern Cheyenne Tribe*

RICHARD ANTHONY BAENEN *
WILKINSON, CRAGUN & BARKER
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4800
* *Counsel of Record for Respondent Confederated Salish and Kootenai Tribes*

STEVEN L. BUNCH *
301 Steamboat Block
616 Helena Avenue
Helena, Montana 59601
(406) 442-9830
* *Counsel of Record for Respondent James Bowen*

Office - Supreme Court, U.S.
FILED
SEP 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2188

In The
Supreme Court of the United States
October Term, 1981

THE STATE OF MONTANA, et al.,
Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MICHAEL T. GREELY
Attorney General for
The State of Montana

HELENA S. MACLAY
DEIRDRE BOGGS
Special Assistant Attorneys General
P. O. Box 8957
Missoula, Montana 59807
(406) 721-5440

Counsel for State of Montana
(and counsel to be served)

(additional counsel on inside cover)

COCKLE PRINTING CO., 2111 Douglas St., Omaha 68102

CALE CROWLEY
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH
P. O. Box 2529
Billings, Montana 59103

MAURICE R. COLBERG, JR.
HIBBS, SWEENEY, COLBERG,
JENSEN & KOESSLER
P. O. Box 2175
Billings, Montana 59103

JAMES E. SEYKORA
BERT W. KRONMILLER
P. O. Drawer S
Hardin, Montana 59034

DOUGLAS Y. FREEMAN
631 N. Center
Hardin, Montana 59034

Counsel for Private Petitioners

TABLE OF AUTHORITIES

Pages

Case

Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976) 3

Statute

28 U. S. C. § 1362 ..... 2, 4

No. 81-2188

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA, et al.,

Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Neither of the two briefs filed by respondents diminishes the compelling reasons for certiorari set forth in the petition. The memorandum of the United States simply underscores the urgent need for the granting of certiorari on all questions presented by petitioners in this case. The United States in effect confesses error on the disclaimer issue and joins petitioners in urging the grant of certiorari on other issues presented. Memorandum for the United States 8-9.

Predictably, the single brief of the remaining respondents, the Crow Tribe, Confederated Salish & Kootenai Tribes, Assiniboine and Sioux Tribes, Northern Cheyenne

Tribe, and James Bowen (hereinafter collectively called "Tribes"), opposes the grant of certiorari. The Tribes contend that the questions presented by petitioners for review do not include what the Tribes perceive as independent, supportable and non-reviewable grounds for the Ninth Circuit judgment. Those grounds, artificially segregated from the remainder of the opinion, are that the United States has "disabling conflicts of interest" which render any state court proceedings inadequate, and that the McCarran Amendment does not require the dismissal of actions brought by Indian tribes under 28 U. S. C. § 1362. The Tribes' evasion of the questions presented in the petition depends completely upon their reconstruction of the Ninth Circuit opinion.

The Ninth Circuit opinion is divided into five sections entitled as follows: I. Procedural History; II. The Disclaimer Issue; III. The *Akin* Factors; IV. Conclusion; V. The Crow Tribe Appeal. Pet. App. 27, 28, 38, 45. The questions presented in the petition do not include Section V, the Crow Tribe Appeal. However, a fair reading of the questions presented and of the opinion of the Ninth Circuit, shows that question 3 of the petition includes all of the *Akin* factors set forth by the Ninth Circuit. Pet. App. 38-45. The Ninth Circuit opinion expressly includes "conflicts of interest" and "jurisdiction under 28 U. S. C. § 1362" as *Akin* Factors. Pet. App. 43-45. The Tribes do acknowledge in footnotes 14 and 15 of their brief that the Ninth Circuit opinion could be read to include each of these items as *Akin* factors, but then the Tribes lamely argue that "the opinion is better understood" as using each of these factors as an independent ground for the Ninth Circuit's judgment. Tribes' Brief 11. We submit that the Tribes'

revisions of the Ninth Circuit opinion, and their unfair reading of the petition, demonstrate wishful thinking on the part of the Tribes, rather than a clear understanding of the Ninth Circuit opinion.

The Tribes do not contend that the Ninth Circuit correctly decided the disclaimer issue. Like the United States, they agree that the disclaimer issue is worthy of certiorari.[1] The disclaimer issue, however, is so inextricably woven into the Ninth Circuit's opinion that if the disclaimer issue is wrong, then the *Akin* factor portion of the opinion is wrong. If the disclaimer issue merits review by this court, then so does the remainder of the Ninth Circuit opinion.

The crux of the *Akin* factor portion of the Ninth Circuit opinion is that because of the disclaimer language in Montana's Enabling Act and Constitution, the state proceedings cannot be comprehensive because Indian reserved water rights cannot be included in the state proceedings. Absent the bar of the disclaimer language, however, the state proceedings may include Indian water rights. Pursuant to the McCarran Amendment and this Court's holding in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) ("*Akin*"), the state may name the United States as a defendant and adjudicate Indian reserved water rights in state court.[2]

---

[1] The Tribes assume "for present purposes that the disclaimer issue, which is also before this Court in No. 81-2147, *Arizona v. San Carlos Apache Tribe*, would otherwise be worthy of consideration on certiorari . . ." Tribes' Brief 6.

[2] The United States itself recognizes that this is currently the law, but asks this Court to revise its holding in *Akin*. Memorandum of the United States 16. The United States also proposes to amend its complaints in the district court in order to fit the new rule it requests. Memorandum of the United States 22, n. 25.

The Tribes have emphasized the conflicts of interest and section 1362 aspects of the Ninth Circuit opinion as their only means of escaping the purview of the McCarran Amendment and *Akin*. However, to say that the Tribes have independent jurisdiction to sue in the federal court under 28 U. S. C. § 1362 does not answer the question posed by the petitioners—does the McCarran Amendment and its underlying policy of avoiding duplicative litigation require affirmance of the district court's dismissal of the complaints of both the United States and the Tribes in this case? Indeed, the Tribes' argument is not determinative if the states may name the United States as a defendant in state court and adjudicate Indian reserved water rights held by the United States as trustee.

The conflict of interest argument, then, is the last remaining way for the Tribes to avoid the petitioners' argument (as conceded by the United States) that the United States may be named as a defendant and, notwithstanding Section 1362, can represent the interests of the Tribes in state court. Significantly, the United States does not admit such conflicts of interest exist. Memorandum of the United States 23, Pet. App. 52. In fact, the United States continues to represent the Tribes in these federal proceedings. The Tribes do not argue that conflicts of interest absolutely prohibit the United States from representing any of the interests of the Tribes.[3] Instead,

---

[3]It would be imprudent for the Tribes to argue that the conflicts of interest prohibit the United States from represent-

(Continued on following page)

the Tribes have emphasized that conflicts of interest "disable" the United States if the United States represents the Tribes in *state* court. We submit that if such a conflict of interest does exist,[4] it would prevent the United States from representing the Tribes regardless of the forum.

None of the respondents contend that the opinion of the Ninth Circuit is completely correct. It is obvious that if the opinion and judgment stand unreviewed by this Court, the water adjudication systems of the western disclaimer states will be seriously disrupted. *See*, Amicus briefs of the states of Alaska, Idaho, Nevada, New Mexico, North Dakota, South Dakota, Utah, Washington and Wyoming. The petition for a writ of certiorari to the Ninth

---

(Continued from previous page)

ing the Tribes' interests in every aspect of the federal proceedings, for it would deprive several of the Tribes of any cases in which to intervene. With the exception of the complaint filed by the Northern Cheyenne Tribe, United States initiated all actions in federal court on behalf of the Tribes. The Crow Tribe attempted to intervene in the proceedings, and the Assiniboine and Sioux Tribes were permitted to intervene in the proceedings almost simultaneously with the filing of the complaint pertaining to their reserved water rights. The Confederated Salish and Kootenai Tribes did not move to intervene in the proceedings until almost four months after the United States filed notices of appeal from the district court decision. The tribes living on the Blackfeet, Rocky Boy's and Fort Belknap reservations in Montana have not participated in any of these proceedings, apparently acknowledging that the representation by the United States is adequate and proper.

[4]In the view of the United States and the petitioners, conflicts of interest do not exist merely because the United States represents both the Tribes and federal agencies claiming reserved water rights. In all of its complaints on file in the district court, the United States has acknowledged the reserved rights of the Tribes it represents, and has acknowledged that those rights predate any reserved or appropriative rights of the United States.

Circuit Court of Appeals should be granted, and the decision below should be summarily reversed.

Respectfully submitted,

MICHAEL T. GREELY
Attorney General for the
State of Montana

HELENA S. MACLAY
DEIRDRE BOGGS
Special Assistant Attorneys General
P. O. Box 8957
Missoula, Montana 59807
(406) 721-5440

Attorneys for Petitioner
State of Montana

CALE CROWLEY
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH
P. O. Box 2529
Billings, Montana 59103

MAURICE R. COLBERG, JR.
HIBBS, SWEENEY, COLBERG,
JENSEN & KOESSLER
P. O. Box 2175
Billings, Montana 59103

JAMES E. SEYKORA
BERT W. KRONMILLER
P. O. Drawer S
Hardin, Montana 59034

DOUGLAS Y. FREEMAN
631 N. Center
Hardin, Montana 59034

Counsel for Private Petitioners

September, 1982

Office - Supreme Court, U.S.
FILED
JUN 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2188

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA, et al.,
Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF NEW MEXICO, NORTH DAKOTA, ALASKA, NEVADA, UTAH AND IDAHO AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD SIMMS
General Counsel
Water Resources Division
Room 100, Bataan Memorial Building
Santa Fe, New Mexico 87503
Telephone: (505) 827-2325
Attorney for the State of New Mexico (Counsel of Record)

ROBERT O. WEFALD
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
Attorney for the State of North Dakota

WILSON L. CONDON
Attorney General of Alaska
Pouch K, State Capitol
Juneau, Alaska 99811
Telephone: (907) 465-3600
Attorney for the State of Alaska

RICHARD H. BRYAN
Attorney General of the State of Nevada
Herold Memorial Building
Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 885-4170
Attorney for the State of Nevada

(List continued on inside of cover)

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

DAVID L. WILKINSON
Attorney General of Utah

236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-5261

Attorney for the
State of Utah

DAVID H. LEROY
Attorney General of Idaho

Room 210
Statehouse
Boise, Idaho 83720
Telephone: (208) 334-2400

Attorney for the
State of Idaho

QUESTIONS PRESENTED

Do provisions in the State of Montana's Constitution and Enabling Act which disclaim jurisdiction over Indian lands prohibit Montana state courts from exercising jurisdiction to adjudicate water rights claimed by the United States on behalf of Indian Tribes?

Did the Montana Federal District Court correctly determine that factors of wise judicial administration warrant dismissal of a piecemeal federal court action in favor of comprehensive adjudication of all conflicting water rights in Montana state courts?

TABLE OF CONTENTS

Pages

Questions Presented i

Table of Authorities ii

Interest of *Amici* 1

Reason for Granting the Writ:

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT INTERPRETING THE McCARRAN AMENDMENT AND IS EXPRESSLY CONTRARY TO A DECISION OF THE TENTH CIRCUIT COURT OF APPEALS. 4

Conclusion 11

TABLE OF AUTHORITIES

Cases

Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976) 1, 3, 4, 6, 7, 8, 9, 10

Dugan v. Rank, 372 U. S. 609 (1963) 2

Jicarilla Apache Tribe v. United States, 601 F. 2d 1116 (10th Cir. 1979), *cert. denied*, 444 U. S. 995 (1979) 2, 3, 6, 7, 10

Miller v. Jenkins, 243 F. 2d 157 (5th Cir. 1957), *cert. denied*, 355 U. S. 827 (1957) 2

TABLE OF AUTHORITIES—Continued

	Pages
Organized Village of Kake v. Egan, 369 U. S. 60 (1962)	5
White Mountain Apache Tribe v. Arizona, 649 F. 2d 1974 (9th Cir. 1981)	5
Worcester v. Georgia, 31 U. S. (6 Pet.) 515	5
Statutes	
Act of July 10, 1952, 66 Stat. 560, codified at 43 U. S. C. § 666 ("McCarran Amendment")	3
Act of August 15, 1953, 67 Stat. 589, partially codified at 25 U. S. C. § 1322 and 28 U. S. C. § 1360 ("Public Law 280")	7
Enabling Act of Montana of February 22, 1889, 25 Stat. 676	4
Montana Constitution, Ordinance No. I (1889)	4
Other	
Senate Report 82-755, 82nd Cong. 1st Sess. (1951)	2

No. 81-2188

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA, et al.,
Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF NEW MEXICO, NORTH DAKOTA, ALASKA, NEVADA, UTAH AND IDAHO AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF AMICI

The Western States participating in this brief have the strongest of interests in urging the granting of the Petition for Certiorari and ultimately the reversal of the Ninth Circuit Court of Appeals. These states all have vast acreages of federal lands within their boundaries. All consider water their lifeblood and have established elaborate systems to allocate water within their boundaries. For years these states have been involved in stream adjudications. At least since this Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), as confirmed in *Jicarilla Apache*

Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), *cert. denied*, 444 U.S. 995 (1979), these states have assumed that they could proceed to adjudicate federal water rights, including Indian reserved water rights in state court. The Ninth Circuit decision now tells these states that state adjudication is not possible. The effect for the *amici* states is chaos—the states and their citizens are subjected to duplicative litigation in state and federal forums, with inevitable inconsistencies and expense to water claimants. Those claimants who believe they have a final decree, in whatever forum, are certainly mistaken, for each decree is subject to attacks and prolonged dispute.

Congress has traditionally deferred to the state systems of allocating water within states' boundaries. Until 1952, it was not possible to join the United States as a party in water right adjudications because of the doctrine of sovereign immunity. Congress has acknowledged that failure to join a known interested party to adjudicate relative water rights is a jurisdictional defect which invalidates the proceeding. *Dugan v. Rank*, 372 U.S. 609 (1963), *Miller v. Jenkins*, 243 F.2d 157 (5th Cir. 1957), *cert. denied*, 355 U.S. 827 (1957). The problem caused by the sovereign immunity of the United States was noted in a Senate report:

> If a water user . . . is immune from suits and proceedings in the court for the enforcement of valid decrees, then the years of building the water laws of the Western States . . . to effect honest, fair and equitable division of the public waters will be seriously jeopardized. Senate Report No. 755, 82nd Cong. 1st Sess. (1951) at 5.

Congress cured this problem by passing Senate Bill 18, which was accompanied by the report cited above, and which is now codified at 43 U. S. C. § 666, commonly called the McCarran Amendment. Through this statute Congress gave its consent to "join the United States as a defendant in any suit . . . for the adjudication of rights to the use of water of a river system . . . " Thus, the way was paved for joining all potential claimants in general water right adjudications.

This Court in *Colorado River* recognized the necessity of the adjudication of *all* water rights, including Indian reserved water rights held by the United States as trustee, in a single state forum. This Court rejected an argument accepted by the Ninth Circuit Court of Appeals that Indian water rights were not included in the McCarran Amendment, stating:

> . . . bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the [McCarran] amendment excluding those rights from its coverage would enervate the amendment's objective. 424 U. S. at 811.

The lower court's decision that Montana state courts may not adjudicate Indian water rights jeopardizes the *amici* states' ability to continue to administer their water laws in the manner recognized as essential by this Court, as well as by Congress. The ruling is contrary to the decisions of this Court interpreting the McCarran Amendment and creates a clear conflict with the decision of the Tenth Circuit in *Jicarilla Apache Tribe*. The *amici* respectfully urge this Court to grant Montana's Petition for Certiorari in this case, and to reverse the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts with the Decisions of This Court Interpreting the McCarran Amendment and Is Expressly Contrary to a Decision of the Tenth Circuit Court of Appeals.

I. Disclaimer Provisions

A. Colorado River Water Conservation District v. United States

This Court held unequivocally in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), that the McCarran Amendment evinced an objective of avoiding piecemeal adjudications. After analyzing the language of the Amendment itself, as well as its underlying policy, this Court found that excluding Indian water rights from its coverage "would enervate the Amendment's objective." 424 U.S. at 811. This Court held that all federal water rights, including those held by the United States on behalf of the Indians, must be subject to state jurisdiction in general stream adjudication.

The Ninth Circuit in this case distinguished Montana state courts from those of Colorado on the basis that the Montana Constitution and Enabling Act contain language disclaiming "all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes" and providing that such lands shall "remain subject to the disposition of the United States, . . . (and) under the absolute jurisdiction and control of the Congress of the United States. . . ." Enabling Act of Montana February 22, 1889, 25 Stat. 676; Montana Constitution, Ordinance No. I (1889). According to the lower court, this language

deprived Montana state courts of subject matter jurisdiction. This interpretation of the disclaimer language disregards this Court's holding in *Organized Village of Kake v. Egan*, 369 U. S. 60 (1962).

This Court recognized in *Kake* that the Western States' disclaimer provisions were disclaimers of proprietary interests, not governmental interests. Interestingly, the Ninth Circuit previously agreed with this holding in *White Mountain Apache Tribe v. Arizona*, 649 F. 2d 1274 (9th Cir. 1981). There the Ninth Circuit cited *Kake* and *Jicarilla* for the proposition that the enabling acts required states to disclaim only their proprietary interests in Indian land, not the states' governmental or regulatory authority over that land. 649 F. 2d at 1280.

It is clear that Congress has jurisdiction and control over land owned by the United States and held by it in trust for Indians, so that such lands always remain subject to disposition by Congress. State disclaimers are simply an acknowledgement that Congress has such plenary power over Indian property. Moreover, this principle applies in all 50 states, not just those with express constitutional disclaimers to that effect. *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515 (1832). It is precisely this plenary control which Congress exercised in enacting the McCarran Amendment to authorize the states to adjudicate reserved water rights of Indians held in trust by the United States. Nothing in the disclaimer language prevents the states from accepting and implementing this Congressional grant of regulatory jurisdiction relating to a vital area of state governmental interest.

Nevertheless, the Ninth Circuit chose in this case to create a substantial exception to the Congressional grant of jurisdiction provided by the McCarran Amendment, an exception which would indeed, in the words of this Court, "enervate the Amendment's objective." That objective is to provide for unified proceedings in a single forum which federally created rights will be determined in accordance with federal law and state created rights will be determined in accordance with state law. As this Court stated in *Colorado River*, "Indian interests may be satisfactorily protected under regimes of state law (citations omitted). The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights." 424 U. S. at 812-813 (1976). The Ninth Circuit Decision undermining this objective is in error.

B. Jicarilla Apache Tribe v. United States

The Ninth Circuit admitted that its decision in this case is expressly contrary to that of the Tenth Circuit in the case of *Jicarilla Apache Tribe v. United States*, 601 F. 2d 1116 (10th Cir. 1979), *cert. denied*, 444 U. S. 995 (1979).

The Tenth Circuit in the *Jicarilla* case confronted the same challenge to state jurisdiction based on identical constitutional disclaimer provisions. Relying on this Court's decision in *Colorado River*, the court rejected the contention that the disclaimer provisions deprived New Mexico state courts of jurisdiction to adjudicate Indian claims pursuant to the McCarran Amendment. The Tenth Circuit determined that the McCarran Amendment grant-

ed to all states, including the nine western disclaimer states, subject matter jurisdiction in comprehensive proceedings to adjudicate federal claims to water rights, including those held on behalf of Indian tribes. The court determined that "there exists no conflict between state court assumption of jurisdiction governing general water rights adjudication . . . and the Disclaimer provisions . . .", since "the United States is the proper party to protect *all* federally reserved water rights, including those set aside for use by the Indian tribes." 601 F. 2d at 1131 (emphasis by the court). The court found the proposition that the disclaimer applies only to proprietary interests "particularly persuasive in light of the non-proprietary interest in subjecting the United States to a state action involving a general water right adjudication as provided under the McCarran Amendment." 601 F. 2d at 1133.

With respect to the application of Public Law 83-280, the Tenth Circuit relied on the express language of the law itself, as well as this Court's interpretation in *Colorado River*, P. L. 83-280, according to this Court, "does not purport to limit the special consent to jurisdiction given by the McCarran Amendment." Indeed, it is clear from the language of the Act itself that it is inapplicable to water right adjudications. Nevertheless, the Ninth Circuit criticized the *Jicarilla* decision for failing to recognize the distinction between disclaimer and non-disclaimer states which it claimed Congress had drawn in P. L. 83-280. Ironically, it is the Ninth Circuit decision which purports to create a disclaimer/non-disclaimer distinction in the McCarran Amendment, a distinction Congress did not see fit to make.

The result is a clear conflict between the Ninth Circuit and the Tenth Circuit on this critical issue of state court jurisdiction over Indian water rights. This conflict creates an untenable situation in the Western States which will effectively frustrate the efforts of many of these states to adjudicate all conflicting water rights. This is precisely the situation which Congress sought to correct in enacting the McCarran Amendment.

II. Factors of Wise Judicial Administration

A. Colorado River Water Conservation District v. United States.

As an independent basis for its ruling, the Ninth Circuit determined that the principles of "wise judicial administration" enunciated by this Court in the *Colorado River* case did not warrant dismissal of the federal action. In reaching this conclusion, the Ninth Circuit failed to consider the most important factor in this Court's analysis, and focused on other considerations never mentioned by this Court.

In *Colorado River*, this Court determined that federal and state courts have concurrent jurisdiction with respect to Indian water right. However, it held that factors of "wise judicial administration" warranted dismissal of the concurrent federal action in favor of state court proceedings for comprehensive adjudication of water rights. According to this Court, "the most important of these [factors] is the McCarran Amendment itself." This Court went on to say that "the clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. . . . Indeed, we have

recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings." 424 U. S. at 819.

The Ninth Circuit concluded that the federal proceeding would not be piecemeal. It reached this conclusion despite the fact that the federal actions omitted many water claimants and did not include large bodies of water. The Ninth Circuit ignored the fact that Montana offers comprehensive adjudication of *all* conflicting water rights in state courts under Montana law, in stark contrast to the limited federal actions.

The situation, then, is analogous to that considered by this Court in *Colorado River,* which involved a piecemeal federal action. Colorado, like Montana, had a comprehensive system for the adjudication of all water rights. Considering both these factors, and most importantly, the McCarran Amendment and its underlying policy, this Court determined that the district court's dismissal of the federal court action was appropriate. The Ninth Circuit erred by refusing to follow *Colorado River.*

B. Jicarilla Apache Tribe v. United States

In reaching its decision, the Ninth Circuit determined that the United States could not adequately represent the Indians due to a conflict of interest resulting from the United States' representation of other federal entities. Faced with such a conflict, the court concluded that in order to protect their own interests, the Indians would be necessary parties over whom the state court had no jurisdiction.

This was not one of the factors considered by this Court in the *Colorado River* case, despite the fact that the government asserted rights on its own behalf as well as on behalf of certain Indian tribes. Furthermore, the Tenth Circuit has expressly rejected the same conflict of interest argument.

In the *Jicarilla* case, the Tenth Circuit concluded that the United States was the proper party defendant to represent Indian tribes in adjudications involving reserved water rights. The court further noted that the Indians had the right of intervention through private counsel in such adjudications. Under such circumstances Indian water rights could be adequately protected. The Ninth Circuit refused to follow *Jicarilla* on this point, placing the two circuit courts of appeal in direct conflict on another issue of critical concern to the western states.

This Court pointed out the implications of the Ninth Circuit's holding in a footnote in the *Colorado River* case. Footnote 17 reads as follows:

> Indeed, if exclusion of Indian rights were the conclusion, conflicts between Indian and non-Indian rights, as well as practical matters of adjudication, might have the effect of requiring district court adjudication of non-Indian along with Indian rights, thereby effectively vitiating our construction of the amendment in *Eagle County* and *Water Division No. 5.* 424 U. S. at 811.

The Ninth Circuit's conclusion that Indian water rights can only be adequately protected in Montana federal district court portends the result envisioned by this Court, requiring district court adjudication of non-Indian along with Indian rights. Such a construction is entirely con-

trary to the objective of the McCarran Amendment. In the words of this Court, "the consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights . . ." 424 U.S. at 819. The Ninth Circuit's decision flies in the face of that policy and should be reversed.

CONCLUSION

The Western states joining this brief as *amici* are deeply concerned about the debilitating effect of the Ninth Circuit's ruling in this case. The western disclaimer states are completely incapable of proceeding with effective administration of their most important natural resource, and cannot rely upon piecemeal federal water adjudications to fill the void. The *amici* respectfully urge this Court to grant Montana's petition for a writ of certiorari and to reverse the Ninth Circuit Court of Appeals.

Respectfully submitted,

RICHARD SIMMS
General Counsel
Water Resources Division
Room 100, Bataan Memorial Building
Santa Fe, New Mexico 87503
Telephone: (505) 827-2325
Attorney for the State of New Mexico
(Counsel of Record)

WILSON L. CONDON
Attorney General of Alaska
Pouch K, State Capitol
Juneau, Alaska 99811
Telephone: (907) 465-3600
Attorney for the State of Alaska

ROBERT O. WEFALD
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
Attorney for the State of North Dakota

RICHARD H. BRYAN
Attorney General of the State of Nevada
Herold Memorial Building
Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 885-4170
Attorney for the State of Nevada

DAVID L. WILKINSON
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-5261
Attorney for the State of Utah

DAVID H. LEROY
Attorney General of Idaho
Room 210
Statehouse
Boise, Idaho 83720
Telephone: (208) 334-2400
Attorney for the State of Idaho

Office - Supreme Court, U.S.
FILED
JUN 28 1982
ALEXANDER L. STEVAS,
CLERK

81-2188

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE STATE OF MONTANA, et al.,
Petitioner,

v.

NORTHERN CHEYENNE TRIBE OF THE
NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK V. MEIERHENRY
ATTORNEY GENERAL
State of South Dakota
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Counsel of Record

HAROLD H. DEERING
Assistant Attorney General

JOHN P. GUHIN
Assistant Attorney General

QUESTION PRESENTED

DO THE DISCLAIMERS IN MONTANA'S ENABLING ACT AND CONSTITUTION DEPRIVE ITS STATE COURTS OF JURISDICTION TO ADJUDICATE WATER RIGHTS CLAIMED BY THE UNITED STATES FOR INDIAN TRIBES IN A GENERAL WATER ADJUDICATION PURSUANT TO THE McCARRAN AMENDMENT.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

The Disclaimer Clause in the State Constitutions and Enabling Acts of Arizona and Montana do not deprive the State courts of subject matter jurisdiction to adjudicate federally reserved Indian water rights claimed by the United States in a general water adjudication pursuant to the McCarran Amendment.

CONCLUSION 19

TABLE OF AUTHORITIES

CASES:	PAGE
Bryan v. Itasca County, 426 U.S. 373 (1976)	12
Colorado River Water Conservation District v. United States, 424 U.S. 800, 811 (1976)	5, 8, 9
Jicarilla Apache Tribe v. United States, 601 F.2d 1116, 1133, 1135 (10th Cir. 1979), cert. den. 44 U.S. 995 (1979)	PASSIM
McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973)	17
Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147-48 (1973)	17
Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982)	3
Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982)	3
Organized Village of Kake v. Egan, 369 U.S. 60, 65 (1962)	5, 7, 15, 16
Puyallup Tribe v. Washington Department of Game, 433 U.S. 165, 173 (1977)	17
San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982)	3
State of South Dakota ex rel. Mark V. Meierhenry v. Rippling Water Ranch, Inc., et al., Civ. 80-100, (Sixth Judicial Circuit 1980)	3

White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981) 17

Williams v. Lee, 358 U.S. 217 (1958) 17

OTHER REFERENCES:

18 U.S.C. § 1162(b) 12

25 U.S.C. § 1322(b) 12

28 U.S.C. § 1360(b) 12

43 U.S.C. § 666 2, 7

Act of February 22, 1889, Ch. 180, 25 Stat. 676 at § 4 2

Act of August 15, 1953, Ch. 505, 67 Stat. 588, P.L. 83-280 PASSIM

Arizona Constitution, Article XX, § 9

McCarran Amendment, 1952 PASSIM

Montana Constitution, Article I 9

South Dakota Constitution, Article XXII, paragraph Second 2

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE STATE OF MONTANA, et al.,

Petitioner,

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF AMICUS CURIAE

The federal Enabling Act whereby the State of South Dakota was admitted into the Union disclaims "all right and title . . . to all lands

. . . owned or held by any Indian or Indian tribe; . . ." and provides that until such Indian title is extinguished, those lands "shall remain under the absolute jurisdiction and control of the Congress . . . ." Act of Feb. 22, 1889, Ch. 180, 25 Stat. 676, at § 4. That language was subsequently included in the South Dakota Constitution. S.D. Const. Art. XXII, paragraph Second. This disclaimer language is virtually identical to the disclaimer provisions in both the Enabling Acts and State Constitutions of the States of Arizona and Montana, although South Dakota does provide for a different procedure for repeal of the disclaimer.

At issue here is whether that disclaimer language serves to deprive a state court of subject matter jurisdiction to adjudicate Indian water rights held in trust by the United States in a general stream adjudication pursuant to the McCarran Amendment (43 U.S.C. § 666). The United States Court of Appeals for the Ninth

Circuit held for the first time that the disclaimer was such a bar to subject matter jurisdiction in the cases of Northern Cheyenne Tribe, et al. v. Adsit, et al., 668 F.2d 1080 (9th Cir. 1982), San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), and Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982), hereinafter collectively referred to as Adsit.

South Dakota, a disclaimer state, commenced a general stream adjudication in state court on March 17, 1980, and served the United States with process, both in its own capacity and in its capacity as trustee for the various Indian tribes in South Dakota, in reliance on the McCarran Amendment. State of South Dakota ex rel. Mark V. Meierhenry v. Rippling Water Ranch, Inc., et al., Civ. 80-100, (Sixth Judicial Circuit 1980). This general adjudication will determine the extent and priority of all surface and groundwater rights (except small domestic water rights) in approximately two-thirds of the land area of South

Dakota, including the mainstem and western tributaries of the Missouri River and will include approximately 42,000 defendants. The United States has indicated that it intends to assert ownership or trusteeship of about 7.3 million acres of land.

South Dakota undertook this case (as most of the other western states have undertaken similar cases) so as to resolve questions relating to the quantity and nature of both reserved and non-reserved water rights. The decision of the Ninth Circuit in the Adsit case seriously jeopardizes this effort and so jeopardizes the ability of the State of South Dakota ultimately to administer its water laws on a comprehensive basis. South Dakota's interest in an orderly determination of all water rights in the state constitutes its interest herein.

SUMMARY OF ARGUMENT

The State of South Dakota, Amicus Curiae herein, contends that the reasoning of the court

in the Adsit decision is erroneous in its refusal to recognize the applicability of this Court's rationale as set out in the case of Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976); in its refusal to recognize the proprietary/governmental distinction in the application of state disclaimers of right and title to Indian land as set out by this Court in the case of Organized Village of Kake v. Egan, 369 U.S. 60 (1962); in its holding that compliance with Public Law 83-280 was the only method of acquiring subject matter jurisdiction over Indian water rights notwithstanding the fact that Public Law 83-280 excludes Indian water rights from the scope of its coverage; and in its rejection of the reasoning of the United States Court of Appeals for the Tenth Circuit as set forth in the case of Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), cert. den. 444 U.S. 995 (1979). The State of South Dakota respectfully

urges that the disclaimer provision has no application in a McCarran Amendment setting because the United States is the proper party defendant to claim Indian water rights; that Public Law 83-280, by its own language, does not apply to adjudication of Indian water rights; and, that disclaimer does not serve as a bar to state court subject matter jurisdiction because a general water adjudication is a non-proprietary assertion of jurisdiction by the state. Therefore, the State of South Dakota respectfully urges that the Petition for a Writ of Certiorari be granted.

ARGUMENT

This brief is submitted by the State of South Dakota to this Court in support of the Petition for a Writ of Certiorari filed in the above-captioned matter. The petition asks this Court to grant review of a question of paramount importance to the western states. In the Adsit case the Ninth Circuit held, for the first time, that

certain disclaimer language found in the respective Enabling Acts and State Constitutions of the States of Montana and Arizona deprived the state courts of subject matter jurisdiction to determine federally reserved Indian water rights in a general water adjudication. It is the position of the State of South Dakota that such a holding virtually precludes the accomplishment of the congressional objectives of the McCarran Amendment (43 U.S.C. § 666) in the disclaimer states, is in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979) cert. den. 444 U.S. 995 (1979), and unduly limits this Court's interpretation of a similar disclaimer provision in the case of Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

In passing the McCarran Amendment in 1952, Congress enacted a statutory waiver of sovereign immunity and granted state courts jurisdiction

over the United States in actions involving a comprehensive adjudication of water rights. The McCarran Amendment provides in pertinent part as follows:

> "(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a water system or other source . . . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances . . . ."

In 1976, this court held that the McCarran Amendment was a grant of jurisdiction to determine federally reserved Indian water rights. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), hereinafter referred to as Akin. In Akin, this Court reasoned that both the language and the underlying

legislative policy of avoiding piecemeal litigation of water rights in a river system supported a holding that the Amendment applied to the adjudication of those reserved water rights of the United States held by it in trust for the Indian tribes. This Court held that a construction of the McCarran Amendment which excluded Indian water rights from its coverage, "would enervate the amendment's objective." 424 U.S. at 811.

The disclaimer provisions in both the Arizona and Montana Enabling Acts and Constitutions are in substance identical to the South Dakota disclaimer. See Arizona Const., Art. XX, paragraph Fourth; Montana Const., Art. I; S.D. Const. Art. XXII, paragraph Second. The provisions are also similar to the disclaimer clauses with reference to the States of New Mexico, North Dakota, Washington, Wyoming, Utah, and Idaho. These provisions disclaim all right and title to Indian lands, and provide that such lands shall be and remain within the absolute jurisdiction and

control of Congress. The Adsit court held that the presence of these disclaimer provisions served as a basis for distinguishing Akin. The court began its "analytical framework" with the critical assumption that the disclaimer provision constitutes a disclaimer of subject matter jurisdiction over Indian water rights, viewing the McCarran Amendment simply as a grant of personal jurisdiction over the United States. According to the Adsit court's reasoning, until a state's disclaimer is repealed, the state court has no subject matter jurisdiction and accordingly the McCarran Amendment and the Akin rationale are not applicable.

The Ninth Circuit Court of Appeals relied on the distinction between disclaimer and non-disclaimer states evidenced in Public Law 83-280 (Act of Aug. 15, 1953, Ch. 505, 67 Stat. 588), hereinafter referred to as Public Law 280, in reaching its decision that a disclaimer state could not assert subject matter jurisdiction over Indian water rights absent both a state's repeal of its

disclaimer, and tribal consent to such repeal in accordance with the 1968 amendments to Public Law 280. The Adsit court concluded that not to apply the disclaimer/non-disclaimer distinction in a McCarran Amendment setting would rob that distinction of all significance. In essence, the Adsit court holds that disclaimer states must comply with Public Law 280 to implement the McCarran Amendment. Nothing in the language or legislative history of either Public Law 280 or the McCarran Amendment supports such a proposition.

Initially, the State of South Dakota would point out that Public Law 280, as codified, specifically excludes water rights from its scope:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; . . . or shall confer jurisdiction upon the State to adjudicate,

> in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

25 U.S.C. § 1322(b); see also, 28 U.S.C. § 1360(b), and compare 18 U.S.C. § 1162(b).

Therefore, it is difficult to see just what effect compliance with Public Law 280 would have on the disclaimer issue in a water rights setting. Compare Bryan v. Itasca County, 426 U.S. 373 (1976). Furthermore, this Court in Akin specifically addressed the relationship between Public Law 280 and the McCarran Amendment:

> "To be sure, 25 U.S.C. § 1322(b) and 28 U.S.C. § 1360(b) provide that nothing in those sections 'shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right of possession of [any real or personal property, including water rights, belonging to any Indian or any Indian tribe . . . that is held in trust by the United States].' This provision in both sections, however, only qualifies the import of the general consent to state jurisdiction given by those sections. It does not purport to limit the special consent to jurisdiction given by the McCarran Amendment. A contrary conclusion is foreclosed by the principle of construction that 'where there is no

> clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" (Citation omitted) 424 U.S. at 812-13 n.20.

The exclusion of water rights from Public Law 280 jurisdiction is common to both disclaimer and non-disclaimer states. Therefore, the Adsit court's distinction of Akin on the basis of the disclaimer is a dubious one.

In arriving at its decision the Adsit court expressly rejected the reasoning of the Tenth Circuit in the case of Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), cert. den. 444 U.S. 995 (1979) where the court declined to distinguish between disclaimer and non-disclaimer states in a McCarran Amendment proceeding. There, the Tenth Circuit Court of Appeals considered the effect of the New Mexico disclaimer provision on the jurisdiction of state courts over federally reserved Indian water rights in a general stream adjudication. The New Mexico disclaimer provision is for legal purposes identical

to the Arizona and Montana disclaimers. The Jicarilla court ruled that there was no conflict between the disclaimer and the state assumption of jurisdiction. "The basic, fundamental reason is that the United States is the proper party to protect all federally reserved water rights, including those set aside for use by the Indian tribes." 601 F.2d at 1131. The court relied heavily on the Akin reasoning in reaching that decision.

The Jicarilla court also relied on footnote 20 of the Akin decision in rejecting the Public Law 280 argument later adopted by the court in Adsit, reasoning that the McCarran Amendment's specific grant of jurisdiction was controlling over the general grant of jurisdiction found in Public Law 280.

The Jicarilla court went on to address the argument made by the State of New Mexico that the disclaimer applied only to a proprietary

interest in Indian lands, finding such a contention "particularly persuasive in light of the non-proprietary intent in subjecting the United States to a state action involving a general water right adjudication as provided under the McCarran Amendment." 601 F.2d at 1133. The court found that the New Mexico disclaimer prohibited the state from exercising a proprietary interest in the Indian lands but did not prohibit state control which does not either interfere with tribal self-government or impair a right granted or reserved by federal law. 601 F.2d at 1135.

In reaching that decision, the Jicarilla court relied on this Court's interpretation of the Alaska disclaimer provision in Organized Village of Kake v. Egan, 369 U.S. 60 (1962). There, this Court indicated that the Alaska disclaimer was simply carrying forward congressional policy with reference to admission legislation as evidenced by the prior admission legislation touching Indians, which included the states of Arizona, New Mexico,

Montana, South Dakota, North Dakota, Washington, Wyoming, Idaho and Utah. The Court explained that Congress' intent by use of the disclaimer "was to preserve the status quo with respect to aboriginal and possessory Indian claims, so that statehood would neither extinguish them nor recognize them as compensable." 369 U.S. at 65. This Court held:

> "The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest. It was determined, after some debate, to be the best way of insuring that statehood would neither extinguish nor establish claims by Indians against the United States." 369 U.S. at 69.

This Court then held that Alaska could regulate the off-reservation fishing of non-reservation Indians concluding that such regulation neither interfered with Indian self-government nor impaired any right granted or reserved by federal law. The Adsit court seizes upon this factual setting as a basis for distinguishing Kake, and refuses to apply the proprietary/governmental distinction to a question

involving reservation Indians on the reservation. Compare, White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981).

This Court has repeatedly held, that "even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147-48 (1973); Puyallup Tribe v. Washington Dept. of Game, 433 U.S. 165, 173 (1977). The Adsit court addresses only part of that test and holds that the interference with tribal self-government test set out in Williams v. Lee, 358 U.S. 217 (1958) has no application, relying on the case of McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973). However, the Adsit court does not carry through with the McClanahan rationale in that the Adsit court makes no preemption analysis at all, presumably because of its novel approach to the disclaimer issue.

Unlike the situation in McClanahan where there was a strong congressional policy against state taxation of reservation Indians, as evidenced by the specific Navajo Treaty involved and the Buck Act, there is a strong congressional policy, as evidenced by the McCarran Amendment, extending jurisdiction to the states on questions of water rights. As the court held in Jicarilla, supra:

> "'In summary, the cases stress that regulatory powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes. Congress may delegate this authority to the state, but when it does so it must be in specific terms.' (Citation omitted) Such delegation is precisely the effect of the McCarran Amendment." 601 F.2d at 1135.

The split in logic between the Adsit decision and the Jicarilla decision is clear. The Adsit case holds that a state constitutional disclaimer is a bar to state subject matter jurisdiction over Indian water rights. The Jicarilla case holds that the disclaimer is inapposite because the United

States is a proper party defendant, relying on Akin. The disclaimers involved are as a practical matter identical, as is the South Dakota disclaimer.

CONCLUSION

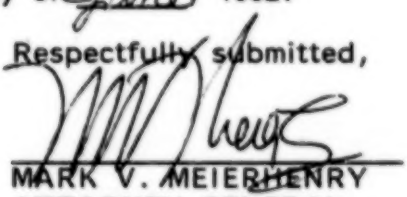
In light of the growing scarcity of water, there is a vital need for the western states to proceed with an orderly determination of all water rights, a need which compels South Dakota to urge this Court to grant the Petition for a Writ of Certiorari in the above-captioned case. As a practical matter, the holding of the Ninth Circuit Court of Appeals in the Adsit cases results in an absolute bar to any general adjudication of water rights in many of the states intended to benefit from the McCarran Amendment. Such a result is simply not justified under any federal statute, treaty, or relevant case law. The Ninth Circuit reasoning renders this Court's Akin decision inapplicable in the disclaimer states and virtually distinguishes Kake into nonexistence, and in the

process circumvents the strong congressional statement of purpose found in the McCarran Amendment, at least in the disclaimer states.

Furthermore, the Adsit reasoning is in direct conflict with the Jicarilla decision decided by the Tenth Circuit on an identical legal question, a question of supreme importance to the western disclaimer states. The State of South Dakota therefore respectfully urges that the Petition for a Writ of Certiorari be granted.

Dated this 21th day of June, 1982.

Respectfully submitted,



MARK V. MEIERHENRY
ATTORNEY GENERAL

Harold H. Deering
Assistant Attorney General

John P. Guhin
Assistant Attorney General

FILED
DEC 14 1982

No. 81-2188

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1981

THE STATE OF MONTANA, et al.,

Petitioners,

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE OF THE STATE OF WASHINGTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH O. EIKENBERRY,
Attorney General,

CHARLES B. ROE, JR.,
Senior Assistant Attorney General,

Attorneys for Amicus Curiae,
State of Washington,

Office and Post Office Address:
Temple of Justice,
Olympia, Washington 98504
(206) 753-6200

TABLE OF CONTENTS

	Page
I. STATEMENT OF INTEREST OF AMICUS CURIAE	2
II. ARGUMENT	3
A. *The "Disclaimer Clause" Issue*	3
B. *The "Wise Judicial Administration" Issue*	3
CONCLUSION	4

TABLE OF AUTHORITIES

Table of Cases

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 3, 4

Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir., 1979), cert. denied, 444 U.S. 945 (1979) .. 3

Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir., February 22, 1982) 2

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 3

Pacific Live Stock Co. v. Lewis, 241 U.S. 1084 (1916) . 2

San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir., February 23, 1982) 2

The State of Arizona, et al. v. San Carlos Apache Tribe of Arizona and the Navajo Tribe of Indians, et al., No. 81-2147 ..... 1, 2, 3

United States Statutes

43 U.S.C. § 666 (McCarran Amendment) 3

Washington Constitution

Article XXVI, Washington Constitution 2

No. 81-2188

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1981

THE STATE OF MONTANA, et al.,

Petitioners,

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE OF THE STATE OF WASHINGTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The State of Washington, through its attorney general, files this Brief Amicus Curiae in accordance with Rule 36 of the Court. This brief is submitted as a companion to the Brief Amicus Curiae filed by the State of Washington on July 9, 1982 in *The State of Arizona, et al. v. San Carlos Apache Tribe of Arizona and the Navajo Tribe of Indians, et al.*, No. 81-2147.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The petition of the State of Montana presents, as a primary issue: whether a "disclaimer clause," contained in either a federal "enabling" act admitting a state to the federal union or in a state's own constitution, bars a state court from determining the validity of claims of Indian reserved water rights in a general adjudication proceeding.[1]

The State of Washington is a "disclaimer" state. In our *San Carlos Apache* Amicus Curiae Brief we detailed an active Washington State general adjudication program, administered over two decades without interruption by jurisdictional challenge, that determined the validity of the Indian water right claims presented by the United States. We further described the injurious cloud placed over Washington State's beneficial ongoing program of state court general adjudications by the Ninth Circuit Court of Appeals' decisions in *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir., February 22, 1982) and *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (9th Cir., February 23, 1982).[2]

---

[1] An example of a disclaimer provision is:

> That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.

The quoted provision is a portion of Washington's Constitution, Article XXVI. At least eight other western states have the same or similar provisions — Montana, Arizona, Wyoming, New Mexico, Utah, Idaho, North Dakota, and South Dakota.

[2] The benefits derived from completed general adjudication proceedings were set forth in *Pacific Live Stock Co. v. Lewis*, 241 U.S. 1084, 1096 (1916), as follows:

> It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the

II. ARGUMENT

A. The "Disclaimer Clause" Issue

In order to avoid repetition, we summarize the argument set forth in our Brief Amicus Curiae filed in *San Carlos Apache*, *supra*. (Reference is respectfully directed to the expanded views and urgings of the State of Washington contained in that brief.)

Our ultimate plea is that this Court grant Montana's Petition for Writ of Certiorari and, by summary disposition, reverse the decision of the Ninth Circuit in this case as it pertains to the disclaimer issue. This approach is commended based on the clear teachings of *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).[2] The two opinions of this Court, when taken together, support the proposition that the Congress may permit courts of a disclaimer state to exercise jurisdiction over Indian property interests without modification of the wording of either a federal or state disclaimer clause. They further hold, in combination, that, by enactment of the McCarran Amendment — 43 U.S.C. § 666, Congress has authorized the validity of Indian reserved water right claims to be determined in a state court general adjudication proceedings of disclaimer states.

B. The "Wise Judicial Administration" Issue

On the issue of "wise judicial administration," the State of Washington joins in the position set forth by the

---

waters may be distributed, under public supervision among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses, with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

[2]See also *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir., 1979), cert. denied, 444 U.S. 945 (1979).

states of New Mexico, North Dakota, Alaska, Nevada, Utah, and Idaho in their Brief Amicus Curiae filed with this Court in July, 1982. That position is found at pages 8-9 of said brief. The foundation of the position is that, where there are competing federal and state court water right cases, the McCarran Amendment evinces a policy of "avoidance of piecemeal adjudication of water rights" that favors a processing of a state court general adjudication proceeding. *Colorado River Water Conservation District, supra*, 819.

CONCLUSION

The State of Washington urges the granting of the petition for writ of certiorari of the State of Montana.

DATED: August 13, 1982.

Respectfully submitted,

KENNETH O. EIKENBERRY,
Attorney General,

CHARLES B. ROE, JR.,
Senior Assistant Attorney General

Office - Supreme Court, U.S.
FILED
JUL 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

The State of Montana, et al.,
Petitioners,
versus
Northern Cheyenne Tribe of the Northern
Cheynne Indian Reservation, et al.,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF WYOMING AS AMICUS CURIAE

Steven F. Freudenthal
Attorney General of Wyoming
Counsel of Record
Lawrence J. Wolfe
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

Of Counsel
Michael D. White
James L. Merrill
Nossaman, Krueger & Knox
511 16th St., Suite 300
Denver, Colorado 80202
(303) 595-9441

QUESTION PRESENTED

DID THE NINTH CIRCUIT ERR IN HOLDING THAT THE McCARRAN AMENDMENT'S SPECIAL GRANT OF JURISDICTION TO THE STATES TO ADJUDICATE FEDERAL AND INDIAN WATER RIGHTS IS NULLIFIED BY A STATE'S CONSTITUTIONAL DISCLAIMER OF PROPRIETARY AUTHORITY OVER INDIAN LANDS?

TABLE OF CONTENTS

Page

Table of Authorities Cited ii

Interest of Amicus 1

Argument 5

I. THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE TENTH CIRCUIT CONCERNING STATE COURT JURISDICTION TO ADJUDICATE INDIAN WATER RIGHTS 5

A. The Ninth Circuit's Decisions Ignore This Court's Interpretation of the Disclaimer Provisions and Conflict With the Tenth Circuit's Interpretation of those Provisions 5

B. The Ninth Circuit's Decisions Ignore the Express Language of Public Law 83-280 Which Renders That Law Inapplicable to the Determination of Indian Water Rights 6

C. The Ninth Circuit's Decisions Ignore this Court's and the Tenth Circuit's Holdings that the McCarran Amendment is a Specific Grant of Jurisdiction to the States to Adjudicate Indian Water Rights 7

II. THE NINTH CIRCUIT'S DECISIONS WILL INTERFERE WITH THE WESTERN STATES'S EFFORTS TO EFFICIENTLY AND EXPEDITIOUSLY ADJUDICATE ALL RIGHTS TO THE USE OF WATER 9

Conclusion 10

TABLE OF AUTHORITIES CITED

Cases — Page

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 7,8,9,10

In re: *the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, No. 4993 (Dist. Ct. Wyo. filed in January 24, 1977) 2,3,4

Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979) 3,6,8,9

Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982) 3,5

Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982) 3,5,6,8

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 5,6

Rosebud Souix Tribe v. Kneip, 430 U.S. 584 (1977) 7

San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982) 3,9

United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971) 6

United States v. District Court in and for Water Division No. 5, 401 U.S. 527 (1970) 6

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 6

White Mountain Apache Tribe v. Arizona, 649 U.S. F.2d 1274 (9th Cir. 1981) 5

Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 7

Wyoming v. United States, C 77-039K (D. Wyo. May 31, 1977) 2

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Code
18 U.S.C. § 1162(b) (1976) 7

25 U.S.C. § 1322(b) (1976) 7

28 U.S.C. § 1360(b) (1976) 6

43 U.S.C. § 666 (1976) 2,7,8,9,10

United States Statutes at Large
67 Stat. 588 (1953) (Public Law 83-280) 6,7,8

Act of Admission, State of Wyoming
26 Stat. 222 (1890) 1

Wyoming Constitution
Article 21, § 26 1

Wyoming Statutes
Wyo. Stat. § 1-37-106 (1977) 2

Wyoming Rules of Civil Procedure
Rule 24(b) 3

Rule 52(c) 4

OTHER MATERIAL

Adjudication of Water Rights Hearings on S.18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess., 6-7, 67-88 (1951) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2188

The State of Montana, et al.,
Petitioners,
versus
Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, et al.,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF WYOMING AS AMICUS CURIAE

INTEREST OF AMICUS

Wyoming is a disclaimer state.[1] Federal and state courts in Wyoming have considered jurisdiction issues similar to those raised by the instant cases and have sustained state court jurisdiction to adjudicate claims to water for the Wind River Indian Reservation. Relying upon these rulings, Wyoming has spent approximately seven million dollars thus far in its five year effort to adjudicate all Indian, federal, state and private rights to use water in the Big Horn River system.

The decisions of the United States Court of Appeals for the Ninth Circuit herein undermine Wyoming's investment in its general stream adjudication and threaten

[1] Article 21, § 26 of Wyoming's Constitution contains a disclaimer provision virtually identical with those at issue in these cases. While Wyoming does not have an "enabling act" *per se*, its Act of Admission, 26 Stat. 222 (1890) is silent concerning jurisdiction over Indian lands.

the State's efforts to manage its water for the benefit of all of its citizens. A brief history of Wyoming's Big Horn Adjudication will help illustrate the State's interest in the issues raised herein.

In January 1977 Wyoming began a general stream adjudication, pursuant to Wyo. Stat. § 1-37-106 (1977), to determine all rights to use water in the Big Horn River and all other sources of water in Wyoming's Water Division Three,[2] located generally in the northwest quadrant of the State. Pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1976), the United States was joined in its proprietary capacity and its fiduciary capacity as trustee for the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation.

A month later, the United States removed the case to the United States District Court for the District of Wyoming based on federal constitutional and statutory questions presented by the adjudication. While in federal court, the United States argued that the action did not constitute a "suit" within the meaning of 43 U.S.C. § 666, that the United States had not waived its sovereign immunity and that the court could not determine the water rights held by the federal government. On May 31, 1977, the District Court found that the action was a general stream adjudication and that the United States had waived its soverign immunity. The federal court remanded the action to Wyoming state court, citing congressional policy favoring state court adjudication of water rights.[3]

Later in 1977, the United States moved to dismiss the action for failure to join indispensable parties (the Shoshone and Arapahoe Tribes) and for lack of jurisdiction based on the disclaimer clause of the Wyoming Constitution. The court denied the Unitd States' Motion to

[2] *In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, No. 4993 (Dist. Ct. Wyo. filed in January 24, 1977).

[3] *See* Findings of Fact, Conclusions of Law and Order Remanding to State Court, *Wyoming v. United States*, C77-039K (D. Wyo. May 31, 1977).

Dismiss and granted leave to the Tribes to intervene permissively pursuant to Wyo. R. Civ. P. 24(b).[4]

In 1979, the United States Court of Appeals for the Tenth Circuit decided *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979), holding that the disclaimer provision of the New Mexico Constitution, virtually identical to Wyoming's, did not preclude state court adjudication of Indian water rights in New Mexico. The Tenth Circuit's analysis paralleled that of the Wyoming state court more than a year earlier.

Also in 1979, the Wyoming state court referred the adjudication to a Special Master and directed the Master to report to the Court concerning the water rights of all claimants including the United States as well as the Tribes of the Wind River Indian Reservation.[5] By stipulation of the major parties, the Master first addressed the United States' and Tribes' claims to water for the Wind River Indian Reservation. Thus far, the Master has conducted approximately 130 days of hearings concerning these claims. In all, the Master has heard the testimony of over 80 witnesses and has considered approximately 2400 evidentiary exhibits. Already, the transcript comprises over 18,000 pages. On February 19, 1982, the Master closed the evidence concerning the claims to water for the Wind River Indian Reservation.

Three days later, the Court of Appeals for the Ninth Circuit decided *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982), followed within two days by the decisions herein, *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (9th Cir. 1982), and *Navajo Nation v. United States*, 668 F.2d 1100 (9th Cir. 1982).

[4] *See In re: the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, No. 4993 (Dist. Ct. Wyo. filed January 24, 1977) (Order denying United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction) (Dec. 19, 1977).

[5] *See In re: the General Adjudication of All Rights*, (First Order of Certification and Referral to Master Teno Roncalio and Setting of First Meeting of the Parties, May 29, 1977).

During the week of April 5, 1982, the United States, the Shoshone and Arapahoe Tribes, the State of Wyoming and many private parties filed Proposed Findings of Fact, Conclusions of Law and Interlocutory Decrees concerning water rights for the Wind River Indian Reservation. The Master heard closing arguments concerning this portion of the case on May 10 and 11, 1982, and on May 11, ordered the Indian water rights portion of the adjudication submitted.

As a result of the three February decisions of the Ninth Circuit, Wyoming has asked the state court to reserve and certify the question of its subject matter jurisdiction over the water claims for the Wind River Indian Reservation to the Wyoming Supreme Court pursuant to Wyo. R. Civ. P. 52(c).[6] On May 26, 1982, the United States moved the state court to stay further proceedings pending this Court's disposition of the Petition for Writ of Certiorari or its opinion on the merits herein.[7]

Although Wyoming does not lie within the Ninth Circuit, the opinions below have affected Wyoming's general stream adjudication by forcing the Wyoming state court either to delay further progress in an already lengthy and complex adjudication, or to proceed at the risk of seeing its entire effort threatened by an affirmance of the Ninth Circuit.

[6] *See* Wyoming's Motion to Vacate Position of Order Denying United States' Motion to Dismiss for Lack of Jurisdiction, to Reserve Certain Constitutional Questions for Determination by the Wyoming Supreme Court And to Send Said Questions to the Wyoming Supreme Court, April 13, 1982. *In re: the General Adjudication of All Rights.*

[7] *See* United States' Motion For Stay of Proceedings, May 26, 1982. *In re: the General Adjudication of All Rights.*

ARGUMENT

I. THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE TENTH CIRCUIT CONCERNING STATE COURT JURISDICTION TO ADJUDICATE INDIAN WATER RIGHTS

A. The Ninth Circuit's Decisions Ignore This Court's Interpretation of the Disclaimer Provisions and Conflict With the Tenth Circuit's Interpretation of those Provisions.

In *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982), the decision below, the Ninth Circuit questioned "[i]n a state which, unlike Colorado, expressly disclaims jurisdiction over Indian lands within its constitution and enabling act, does the McCarran Amendment grant jurisdiction and thereby repeal the state disclaimers?" 668 F.2d at 1084. By framing the issue as it did, the court implicity interpreted the disclaimer's "absolute jurisdiction and control" language to mean **exclusive** federal jurisdiction. This Court has clearly rejected that interpretation. *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

Although the Ninth Circuit had earlier recognized that these disclaimers purport to disclaim only a state's ". . . proprietary interest in Indian land, not the states' governmental or regulatory authority . . ." *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1280 (9th Cir. 1981), it failed to apply the distinction in these cases. Nor did the Court below examine the role of a state court conducting a general stream adjudication to determine whether the disclaimer applies.

A general stream adjudication is not "a direct challenge to Indian water rights" as characterized by the Ninth Circuit. Rather it constitutes a comprehensive process in which all rights are determined *inter sese* in ac-

cordance with applicable state or federal law. *See generally, United States v. District Court in and for the County of Eagle*, 401 U.S. 520, 525-26 (1971); *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527, 529-30 (1970). Hence, the fact of an adjudication does not constitute a proprietary claim by a state to Indian lands, but rather is an exercise of the state's governmental power to determine all water rights for the common good.

In *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979), the Tenth Circuit carefully analyzed the nature of a general stream adjudication and concluded that New Mexico's disclaimer does not preclude state court jurisdiction over such an action. 601 F.2d at 1133. The Ninth Circuit refused to follow *Organized Village of Kake* and *Jicarilla Apache Tribe* and provided no sound reason for that refusal.

B. The Ninth Circuit's Decisions Ignore the Express Language of Public Law 83-280 Which Renders That Law Inapplicable to the Determination of Indian Water Rights

In the decision below, the Ninth Circuit concluded that a disclaimer state court cannot assert subject matter jurisdiction over Indian water rights until the state has repealed its disclaimer pursuant to Public Law 83-280. 668 F.2d at 1087. Public Law 83-280, 67 Stat. 588 (1953), is a general jurisdictional statute enacted to respond to the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 471 (1979).

While Public Law 83-280 offered the states a mechanism by which they could assume general jurisdiction over Indians on reservations, the law expressly provides that nothing in its terms shall confer jurisdiction upon the state to adjudicate water rights belonging to any Indian or Indian tribe. 28 U.S.C. §

1360(b) (1976); 18 U.S.C. § 1162(b) (1976); 25 U.S.C. § 1322(b) (1976).

By its very terms, Public Law 83-280 does not allow a state to adjudicate water rights belonging to any Indian or Indian tribe. Hence, the Ninth Circuit's conclusion is irrelevant because even if the federal district court had found that Montana **has** assumed Public Law 83-280 jurisdiction (in addition to correctly concluding that wise judicial administartion requires dismissal in favor of ongoing proceedings in state court), such a finding, standing alone, would not enable the state court to adjudicate Indian water rights.

Although water rights are excluded from the scope of Public Law 83-280, Congress had addressed the determination of Indian water rights in legislation passed 13 months before Public Law 83-280. The McCarran Amendment, 43 U.S.C. § 666 (1976), is a special consent to state jurisdiction over federal and Indian water rights which is not limited by the general provisions of Public Law 83-280. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 812 n. 20 (1976).

C. The Ninth Circuit's Decisions Ignore this Court's and the Tenth Circuit's Holdings that the McCarran Amendment is a Specific Grant of Jurisdiction to the States to Adjudicate Indian Water Rights

Congress has plenary control over land owned by the United States and held by it in trust for Indians. *See, e.g., Rosebud Souix Tribe v. Kneip*, 430 U.S. 584, 594 (1977). State disclaimers are simply an acknowledgement of this principle which applies in all states, not just those with disclaimers. *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Congress exercised this plenary power when it enacted the McCarran Amendment which authorized the states to adjudicate the water rights of Indians along with all other water rights held by the United States as part of a general stream adjudication. *Colorado River Water*

Conservation District v. United States, 424 U.S. 800, 809-10 (1976). While the Ninth Circuit paid lip service to this Court's acknowledgement that section 666 is a special consent to jurisdiction, *Northern Cheyenne Tribe*, 668 F.2d at 1083, the court nonetheless fabricated an exception to the McCarran Amendment which both Congress and this Court have explicitly rejected. *See Adjudication of Water Rights: Hearings on S.18 before a Subcommittee of the Senate Committee on the Judiciary*, 82d Cong., 1st Sess., 6-7, 67-68 (1951); *accord Colorado River*, 424 U.S. at 811-812.

In its extensive analysis of the scope of the McCarran Amendment, the Tenth Circuit noted that this Court's analysis and footnote 20 of *Colorado River* were "of special application here." *Jicarilla Apache Tribe*, 601 F.2d at 1132. The Ninth Circuit critized the Tenth Circuit and the district court below (which followed the Tenth Circuit) for an analysis which "would rob the disclaimer/non-disclaimer distinction made by Congress of all significance and meaning . . ." *Northern Cheyenne Tribe*, 668 F.2d at 1086.

The disclaimer/non-disclaimer distinction is not threatened, however, in the situation presented here. When Congress enacted Public Law 83-280 it intended to insure that the state jurisdiction granted in the McCarran Amendment, passed one year earlier, would not be undermined by states assuming jurisdiction over Indian water rights through the general provisions of Public Law 83-280.

To accomplish this goal Congress expressly excluded the adjudication of Indian water rights from among those matters over which states could assume jurisdiction pursuant to Public Law 83-280. Any adjudication of these rights in state court can only be undertaken pursuant to the provisions of the McCarran Amendment. The McCarran Amendment makes no distinction between disclaimer and non-disclaimer states but rather is a special grant of jurisdiction to all states. *Colorado River*, 424 U.S. at 800. Clearly the disclaimer/non-disclaimer distinction is of no consequence in determining whether a state has properly assumed jurisdiction over the adjudication of Indian water rights.

II. THE NINTH CIRCUIT'S DECISIONS WILL INTERFERE WITH THE WESTERN STATES' EFFORTS TO EFFICIENTLY AND EXPEDITIOUSLY ADJUDICATE ALL RIGHTS TO THE USE OF WATER

In *Colorado River*, this Court specifically acknowledged both the water-scarcity problem in the West and the western states' efforts to resolve the problem. 424 U.S. at 804. By excluding Indian water rights from the scope of the McCarran Amendment, the Ninth Circuit would frustrate the efforts of the states to adjudicate **all** conflicting water rights in accord with the stated purpose of the McCarran Amendment.

Unlike *Colorado River*, these cases do not involve a choice between a general adjudication in federal court and a general adjudication in state court. Here there are no general adjudications pending in federal court. Thus, as emphasized by Judge Merrill's dissent, prohibiting the state court's general adjudication will result in no effective adjudication and will leave the river systems unadministerable. *San Carlos Apache Tribe*, 668 F.2d at 1099, (Merrill, J., dissenting).

The conflict between the Ninth Circuit's decisions below and the Tenth Circuit's decision in *Jicarilla Apache Tribe* creates an untenable situation on many rivers in the West. For example, the watershed on the Big Horn River encompasses Wind River Indian Reservation lands in Wyoming and Crow Reservation lands in Montana. As it stands, even though Montana and Wyoming have identical disclaimer language in their constitutions, the water rights of the Shoshone and Arapahoe Tribes in the Wyoming portion of the Big Horn River watershed can be determined in a Wyoming general stream adjudication, while the water rights of the Crow Tribe in the Montana portion of the Big Horn River watershed cannot be determined in a Montana general adjudication. As pointed out earlier, however, even the Wyoming proceedings may be imperiled because of the possibility of challenge to the state court's subject matter jurisdiction.

The decisions of the Ninth circuit are clearly contrary to the law and policy expressed by Congress in the McCarran Amendment and by this court in *Colorado River*. The Ninth Circuit decisions below are so clearly erroneous as to warrant summary reversal, particularly since setting the case for full briefing and argument will delay this Court's resolution of the issue and, thus, further delay the western states' efforts to address this burdeoning water problem for yet another year.

CONCLUSION

If allowed to stand, the decisions of the Ninth Circuit will create an impediment to the State's administration of water which Congress and this Court, as well as the Tenth Circuit, have expressly rejected. This Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review and reverse summarily its decisions below.

Respectfully submitted,

Steven F. Freudenthal
Attorney General of Wyoming
Counsel of Record
Lawrence J. Wolfe
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

Of Counsel
Michael D. White
James L. Merrill
Nossaman, Krueger & Knox
511 16th St., Suite 300
Denver, Colorado 80202
(303) 595-9441

July 1982

NO. 81-2188-CFX (Vide: 81-2147)	TITLE	Montana, et al., Petitioners v. Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, et al.

DOCKETED	COURT
May 21, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Michael T. Greely
	Counsel for Respondents:
May 21, 1982	Petition for writ of certiorari filed.
May 21, 1982	Appendix filed.
June 23, 1982	Brief, amici curiae, of the States of New Mexico, North Dakota, Alaska, et al. in support of petition filed.
June 28, 1982	Brief, amicus curiae, of the State of South Dakota in support of petition filed.
July 19, 1982	Order extending time to file a response to the petition until Aug. 20, 1982.
July 20, 1982	Brief, amicus curiae, of the State of Wyoming filed.
Aug. 18, 1982	Memorandum for the U.S. filed. (Also in 81-2147)
Aug. 14, 1982	Brief, amicus curiae, for the State of Washington in support of the petition filed.
Aug. 25, 1982	DISTRIBUTED. SL21P1 (Sept. 20, 1982 - Reply brief of Petitioner)
Oct. 4, 1982	Petition GRANTED. The case is consolidated with 81-2147 and a total of one and one-half hours is allotted for oral argument.

Nov. 18, 1982	Brief, amicus curiae, of the State of New Mexico in support of petitioners filed. (Vide: 81-2147).
Nov. 19, 1982	Joint appendix filed. (Vide: 81-2147).
Nov. 19, 1982	Brief for petitioners in 81-2147 filed. (Vide 2147).
Nov. 18, 1982	Brief, amicus curiae, on Behalf of The Colorado River Water Conservation District and The Southwestern Water Conservation District in support of petitioners filed. (Vide: 81-2147).
Nov. 22, 1982	Joint appendix filed. (Vide: 81-2147) (Volume II).
Nov. 22, 1982	Brief for petitioners State of Montana, et al. filed. (Vide: 81-2147).
Nov. 22, 1982	Brief, amici curiae, of the States of Washington, Utah and Idaho filed. (Vide: 81-2147).
Nov. 22, 1982	Brief, amicus curiae, of the State of Colorado filed. (Vide: 81-2147).
Nov. 22, 1982	Brief, amicus curiae, of the State of South Dakota filed.
Nov. 22, 1982	Brief, amicus curiae, of the State of Wyoming filed. (Vide: 81-2147).

(Over)

81-2188

Title

No.

DATE	PROCEEDINGS AND ORDERS
Dec. 2, 1982	Motion of the Solicitor General for divided argument filed. (Also in 81-2147).
Dec. 5, 1982	Motion of petitioners for divided argument and for additional time for oral argument filed. (Also in 81-2147).
Dec. 3, 1982	Motion of Wyoming for leave to participate in oral argument as amicus curiae and for additional time for argument filed. (Also in 81-2147)
Dec. 6, 1982	Motion of petitioners in No. 81-2188 for divided argument filed. (In both cases).
Dec. 6, 1982	Motion of petitioners in No. 81-2188 for additional time for oral argument filed. (In both cases).
Dec. 8, 1982	Motion of petitioners in No. 81-2147 for review of Clerk's action granting respondents' request for an extension of time for filing briefs on the merits filed. DISTRIBUTED. 12-10. (Above motion).
Dec. 3, 1982	Order extending time to file the respondents' brief on the merits until Jan. 21, 1983.
Dec. 13, 1982	The motion of petitioners in No. 81-2147 for review of Clerk's action granting respondents' request for an extension of time for filing briefs on the merits is DENIED. The motion of the Solicitor General for divided argument is GRANTED. The motion of petitioners in No. 81-2188 for divided argument is GRANTED. The motion of petitioners in No. 81-2188 for additional time for oral argument is DENIED. The motion of petitioners in No. 81-2147 for divided argument is GRANTED and the request for additional time for oral argument is DENIED. The motion of Wyoming for leave to participate in oral argument as amicus curiae and for additional time for argument is DENIED.
Jan. 21, 1983	Brief of respondent, James Bowen filed. (Vide: 81-2147)
Jan. 21, 1983	Brief of respondents' Assiniboine and Sioux Tribes, Confederated Salish and Kootenai Tribes, and Northern Cheyenne Tribe filed.
Jan. 21, 1983	Brief of respondents, Salt River Pima-Maricopa Indian Community filed. (Vide 81-2147)
Jan. 21, 1983	Brief of respondent, Navajo Nation filed. (Vide: 81-2147)
Jan. 21, 1983	Brief of respondent, Ft. McDowell Mohave-Apache Indian Community filed. (Vide 81-2147)
Jan. 21, 1983	Brief of the U.S. filed. (Vide: 81-2147)
Jan. 24, 1983	Brief of respondent Crow Tribe of Indians filed. (Vide: 81-2147)
Jan. 24, 1983	Brief, amicus curiae of Chippewa-Cree Tribes of the Rocky Boys Reservations, Montana, filed.

(Card No. 2)

NO. 81-2188-CFX	TITLE Montana, et al., Petitioners v. Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservations, et al.

DOCKETED	COURT
May 21, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
Jan. 25, 1983	Brief, amicus curiae, of the Jicarilla Apache Tribe in support of respondents filed. (Vide: 81-2147).
Jan. 26, 1983	Brief of respondent San Carlos Apache Indian Tribe filed. (Vide: 81-2147).
Feb. 15, 1983	CIRCULATED.
Feb. 25, 1983	Reply brief for petitioners in No. 81-2147 filed. (D). (Vide: 81-2147).
March 14, 1983	Reply brief for petitioners State of Montana et al., in No. 81-2188 filed. (D). (Vide: 81-2147).
March 22, 1983	Motion of Blackfeet Indian Tribe to suspend all proceedings in this Court filed. (Also in 81-2147).
March 23, 1983	ARGUED.
March 28, 1983	← Motion of the United States to file a brief after argument filed. (Alson in 81-2147).
March 29, 1983	DISTRIBUTED. 4-1. (Above motion).
March 31, 1983	Motion of petitioners in 81-2147 for leave to file a response to the brief of the United States after argument filed. (NP).
March 31, 1983	DISTRIBUTED. 4-1. (Above motion).
March 31, 1982	Opposition to motion of the Solicitor General for leave to file a supplemenal brief after argument filed by Montana. (D).
April 4, 1983	The motion of the Solicitor General for leave to file a supplemental brief, after argument, is GRANTED. The motion of petitioners in No. 81-2147 for leave to file a response to the supplemental brief, after argument, is GRANTED.